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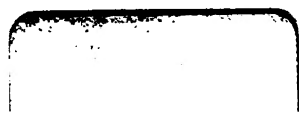
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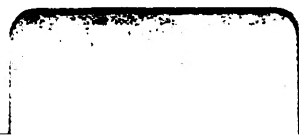
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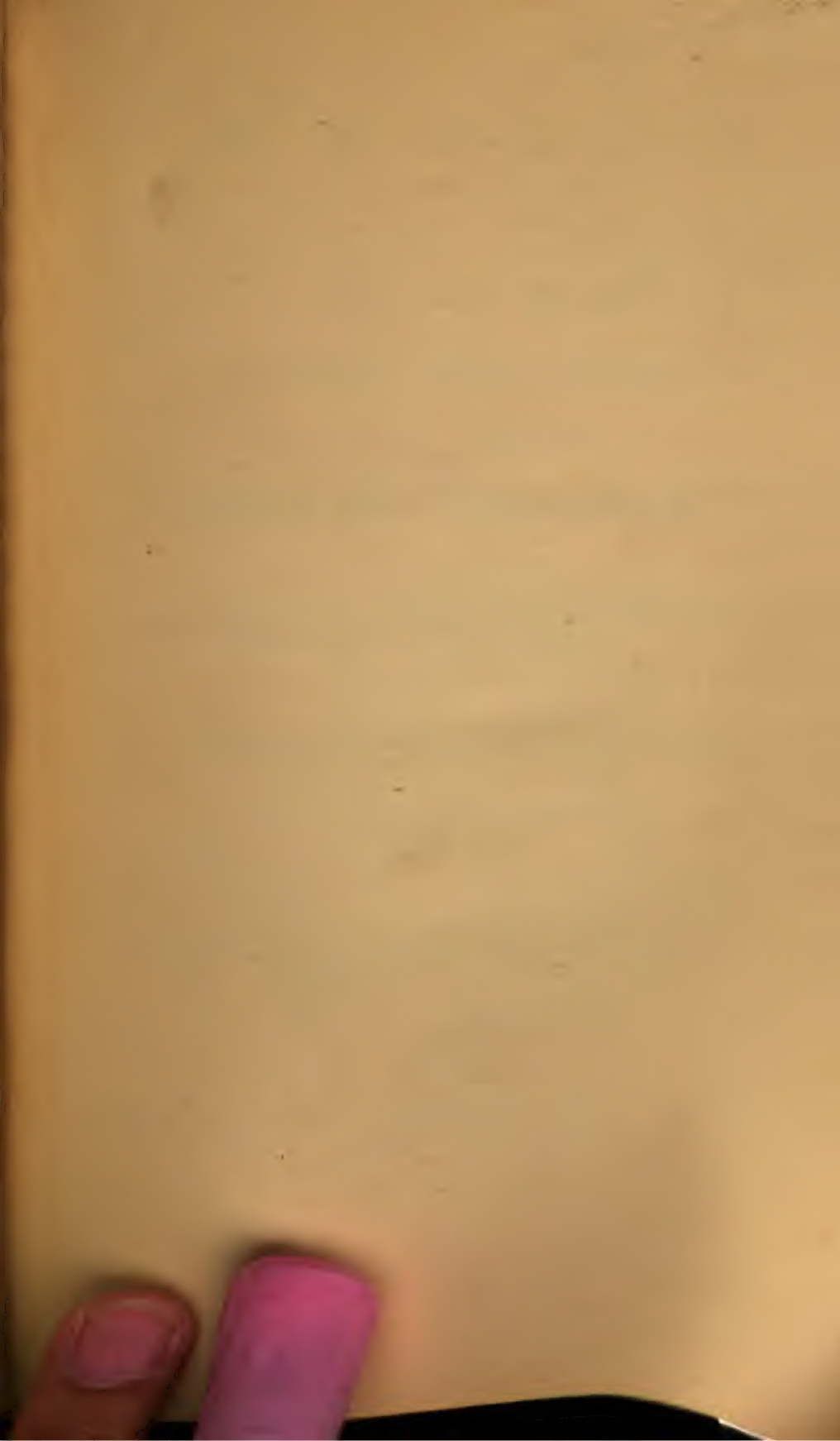
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W. J. G. Smith

R E P O R T S

OF

C A S E S

2 Vols

Revised

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ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

WITH

**TABLES OF THE NAMES OF THE CASES AND PRINCIPAL
MATTERS.**

1792-1815

BY CHARLES MARSHALL,

OF THE INNER TEMPLE, M. A.

VOL. I.

**CONTAINING THE CASES IN THE FIFTY-FOURTH AND FIFTY-FIFTH YEARS OF
KING GEO. III. FROM MICHAELMAS TERM, 1813, TO TRINITY
TERM, 1815, BOTH INCLUSIVE.**

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**T. DAVISON, Lombard street,
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J U D G E S

OF THE

COURT OF COMMON PLEAS,

DURING THE PERIOD OF THESE REPORTS.

**The Right Hon. Sir JAMES MANSFIELD, Knt. Lord Chief Justice; who
resigned in Easter vacation, 1814, and was**

SUCCEEDED BY

The Right Hon. Sir VICARY GIBBS, Knt. Lord Chief Justice.

The Hon. JOHN HEATH, Esq.

The Hon. Sir ALAN CHAMBRE, Knt.

The Hon. Sir ROBERT DALLAS, Knt.

25. 1. 1911

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C A S E S

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

IN

MICHAËLMAS TERM,

IN THE

FIFTY-FOURTH YEAR OF THE REIGN OF GEORGE III.

Memorandum.

EARLY in this term, Mr. Justice *Gibbs* was promoted to the office of Lord Chief Baron of the court of *Exchequer*, on the resignation of Sir *Archibald Macdonald*; and Sir *Robert Dallas*, his Majesty's Solicitor-General, was appointed one of the Judges of the court of *Common Pleas* in his stead. On *Thursday*, the 18th of *November*, he was called to the degree of serjeant at law, and gave rings with the motto, "*mos et lex*;" and on the following day, he took his seat on the bench.

1813.

WHITE AND OTHERS, ASSIGNEES OF SHUTTLEWORTH
AND GOODFELLOW, BANKRUPTS, v. WILKS.

Tuesday, Nov. 9.

A. purchases from the defendant a quantity of oil, which was not to be drawn off, but by agreement was to remain undivided in the defendant's cisterns, and for which A. was to pay a weekly rent for warehouse-room; A's bill for the oil being dishonoured, and he become bankrupt: Held that the oil not having been severed from the defendant's stock, this did not amount to such a delivery as would entitle the assignees of A. to maintain trover for it.

THIS was an action of trover to recover the sum of £1200, being the value of twelve tons of linseed oil, part of a larger quantity then standing in cisterns in the defendant's warehouse, which the bankrupts, previously to their bankruptcy, on the 14th of Jan. 1812, had agreed to purchase of the defendant through the medium of a broker; but they not being immediately in want of the oil, and it never having been measured off, it was agreed that it should remain in the cisterns under the defendant's care, the bankrupts paying rent for the warehouse-room.

The following are copies of the invoice and sale note, and of the bill of exchange drawn by the defendant on the bankrupts for the price of the oil.

Messrs. *Shuttleworth* and *Goodfellow*.

London, 14—28 Jan. 1812.

Bought of *Mathias Wilks*,

Twenty tons linseed oil at £60 . . . £1200.

Mr. *Wilks* holds the above in cisterns for Messrs. *Shuttleworth* and *Goodfellow's* accommodation, charging them 1s. per ton per week rent.

London, 14th Jan. 1812.

Bought this day, by order of Messrs. *Shuttleworth* and *Goodfellow*, of Mr. *Wilks*, twenty tons of linseed oil at £60 per ton, usual allowance, to be free delivered in one month, and be paid for in fourteen days, by their acceptance at four months.

Stephen Clensky, Broker.

£1200.

London, 28th Jan. 1812.

1813.

Four months after date, pay to my order one thousand two hundred pounds, value received in linseed oil,

WHITE and
others,
Assignees, &c.
v.
WILKS.

Matthias Wilks.

Messrs. Shuttleworth and Goodfellow,
Austin Friars.

The above bill was presented and left with the bankrupts for acceptance, but never was accepted by them (a); and about ten days after the presentment, viz. on the 24th of April, 1812, the commission issued. There was no actual delivery of the oil to the bankrupts; and the plaintiffs, after the defendant's refusal to deliver it to them as assignees, on their offering to pay any rent that might be due for warehouse-room, brought the present action.

At the trial, the judge, being of opinion that there had not been a complete sale and delivery, nonsuited the plaintiffs.

Mr. Serjt. *Lens* now moved that the nonsuit should be set aside, and a new trial granted. He cited *Whitehouse v. Frost* (b), which was an action of trover for some oil, under circumstances nearly similar to the present, in which the defence was, that the oil, until measured off, was not capable of a separate delivery; but the court of *K. B.* in that case, held, that the sale and delivery were complete, though the oil had never been drawn off, and that, therefore, trover was maintainable for it.—He also cited *Hurry v. Mangles* (c), where Lord *Ellenborough* held, that the acceptance of warehouse-rent was an executed delivery and a complete transfer of the goods to

(a) No stress, however, seemed to be laid on this circumstance.

(b) 12 East. 614.

(c) 1 Camp. 452.

1813.

WHITE and
others,
Assignees, &c.
v.
WILKS.

the purchaser, though they had never actually been removed from the warehouse of the vendor (a).

Lord Chief Justice MANSFIELD.—In trover for a quantity of sugar, where the sale had been agreed upon, but there had been no actual delivery, the court was of opinion that the action was not maintainable (b); and certainly sugar is of a more divisible nature than oil. The question here is the *separation*, which I think is essential for the support of this action, and there certainly has been no separation of the oil in question.

The other judges concurring,

Rule refused (c).

(a) In *Harman v. Anderson*, 2 Camp. 243, Lord Ellenborough held, that the purchaser of goods having lodged an order from the vendor to deliver them with the wharfinger, in whose warehouse they lay, in consequence of which the latter transferred them in his books to the name of the purchaser, the vendor's right to stop them *in transitu* was gone, and the wharfinger was bound to hold them as the agent of the purchaser.—So, though no transfer be made in the books, provided the order for delivery be lodged with the wharfinger.

(b) His lordship alluded to a case of *Austin v. Craven*, in which this court held that *trover* would not lie, because no specific quantity of sugar had been set apart, and accordingly assumpsit was afterwards brought on the contract.

(c) In *Stonard v. Dunkin*, 2 Camp. 344, Lord Ellenborough refused to allow the defendants, who were warehousemen, to set up as a defence in an action of trover for some malt, that, according to the usage of trade, a *remeasuring* was necessary for the transfer; they having given an acknowledgment that they held it on the plaintiff's account.

Thursday,
Nov. 11.

ANONYMOUS.

The court will not oblige an infant plaintiff to give security for costs.

MR Serjt. *Best* moved for a rule to shew cause why the plaintiff in this action, who was an infant, should not give security for costs. [Mr. Justice *Heath* asked if

this could be moved after issue joined: the secondary certified that it might, but not after verdict.] And he quoted the opinion of Mr. Justice Buller in *Doe d. Selby v. Alston* (a).

1813.

ANONYMOUS.

The Chief Justice observed, that the infant might have a good right of action, and was not to lose his cause because his *prochein ami* was not a man of responsibility.

Rule refused (b).

(a) 1 *Term Rep.* 491. In that case Mr. Justice Buller said, "There are only three instances in which the court will interfere on behalf of a defendant, to oblige the plaintiff to give security for costs: the first is, when an infant sues, the court will oblige his *prochein ami*, or guardian, or attorney, to give security for the costs; 2. when the plaintiff resides abroad, in which case the court will stay proceedings till security is given for costs; and 3. where there has been a former ejectment." This rule has been extended to other actions as well as ejectments. Vid. *Weston v. Withers*, 2 *Term Rep.* 511.

(b) In 2 *Taun.* 61. Anon. this court would not compel the plaintiff to give security for costs, on the ground of his being a bankrupt, or in *Newgate*.

HODGSON AND ANOTHER v. TEMPLE.

Thursday,
Nov. 11.

THIS was an action brought by the plaintiffs, who were malt distillers, for goods sold and delivered to the defendant; and at the trial before the Chief Justice, at the sittings after last *Trin.* term, a verdict was found for the plaintiffs, with liberty to move to set it aside, and enter a verdict for the defendant.

It appeared on the trial, that the goods, consisting of spirits, were delivered at a rectifying distillery kept in the name of the defendant's brother, but, in fact, by the defendant himself, who also kept a retail liquor shop,

It is not sufficient, to invalidate a contract for the sale of goods, that the vendor knew they were to be applied to an illegal purpose, unless he have a share in the unlawful transaction.

1813.

 HODGSON and
 another
 v.
 TEMPLE.

contrary to the 26 *Geo. 3. c. 73. s. 54. (a)*; and that the plaintiffs knew of this circumstance at the time of the delivery.

Mr. Serjt. *Shepherd* now moved to set aside the verdict, on the ground that the plaintiffs had sold the goods to the defendant, knowing that they were to be used in carrying on an illegal trade. He contended that, although the plaintiffs might recover where they were ignorant of the illegal intent, yet here, as they knew that the brother's name was only used as a cloak for the defendant, they were not entitled to a verdict.

But the Chief Justice said, "It is not merely the selling goods, knowing that an improper use is to be made of them, but the seller must have a part in the illegal transaction, to invalidate the contract."

The other judges concurring,

Rule refused (*b*).

(*a*) Which enacts, "That no person licensed to sell brandy or other spirits by retail, or, selling brandy or other spirits by retail, shall be the proprietor or owner of any distillery or rectifying house, or have any part or share in any distillery or rectifying house, or be in any manner concerned in the trade or business of a distiller, rectifier, or compounder of spirits, on pain of forfeiting for every such offence the sum of £200."

(*b*) So is *Holman v. Jackson*, 1 *Cowp.* 341; *Clugas v. Penaluna*, 4 *Term Rep.* 466; *Waymell v. Reed*, 5 *Term Rep.* 599.—See also Lord Kenyon's judgment in *Vandyck v. Hewitt*, 1 *East.* 96.

Thursday,
 Nov. 11.

BELLDON v. TANKARD.

Bail being fixed, if one of them, having paid the debt, bring his action against his co-bail for contribution, he must prove the judgment as well as the execution. THIS action was tried before Mr. Justice *Chambre*, at the last assizes at *York*, and was brought to recover the sum of £10 : 3s. for money paid to the use of the defendant. The plaintiff and defendant had been bail together, and had been fixed with the debt; the present

plaintiff had paid the whole sum, and now brought this action for contribution. Mr. Justice *Chambre* being of opinion that the plaintiff ought to have proved the judgment as well as execution, directed a nonsuit.

1813.
BELLDON
v.
TANKARD.

Mr. Serjt. *Shepherd* now moved to set aside this nonsuit; but the court concurring in opinion with Mr. Justice *Chambre*, held the nonsuit to be right, and refused the rule.

DOE *dem.* JONES AND OTHERS v. WILDS.

Thursday,
Nov. 11.

THIS was an action of ejectment, brought to recover the possession of certain premises in the county of *Hertford*, and was tried before Mr. Justice *Dampier* at the last assizes for that county.

In ejectment, the defendant's son is not a competent witness to prove that he, and not his father, is tenant in possession.

The defendant, in order to shew that he was not in possession of the premises, called his son to prove that he (the son) was in possession of them; but the learned judge, being of opinion that he was not a competent witness, refused to admit his evidence, and a verdict was accordingly found for the plaintiff.

Mr. Serjt. *Best* now moved to set aside this verdict, on the ground that the son's testimony was admissible.—He admitted that, in actions of ejectment against the landlord, the tenant could not be called to support his own possession; for there he had a direct interest, not only to maintain his possession, but because he would be liable to an action for mesne profits, in which the verdict in ejectment would be evidence against him (a): Here, on the contrary, by proving himself tenant, he would have been subjecting himself to an action.

(a) See *Doe dem. Foster v. Williams*, 2 Cowp. 621; and *Bourne v. Turner*, 1 Str. 632.

1813.

DORDEM, JONES
and others
v.
WILDS.

Lord Chief Justice MANSFIELD.—But he would remain in possession till the second action was brought, and the law will not distinguish between such niceties of interest.

The rest of the court concurring,

Rule refused (a).

(a) Vid. *Bent v. Baker*, 3 *Ter. Rep.* 27. in which the general rules respecting the competency of witnesses were laid down by the court of *King's Bench*.

Friday, Nov. 12.

ALDRED v. HICKS.

Where a defendant keeps out of the way to avoid service of process, and a notice of declaration is sent to him in a letter by the post, which is returned opened, and marked "refused:" Held that this is sufficient service.

MR. Serjt. *Best*, on a former day in this term, had obtained a rule to shew cause why the judgment and writ of execution in this case should not be set aside with costs, on the ground of the defendant not having been served either with a writ or notice of declaration.

Mr. Serjt. *Shepherd*, in shewing cause, stated that the plaintiff had served the defendant with a *capias* in *May*; but finding that it had been served on a *Sunday*, he, on the 4th of *June* following, sent another, inclosed in a letter, stating that the former writ was wrong, and that the defendant was to attend to the last only. The defendant having shut himself up to avoid inquiries, both the writs were sent and delivered by the carrier. As to the declaration, a notice of it had been stuck up in the office, and a copy had been sent by the general post, and brought back opened, and marked "*refused*" in red ink.

Mr. Serjt. *Best*, *contra*, contended that this was not sufficient service; that it would be highly mischievous to permit declarations and other proceedings of the court

to be sent by the post, and that no case could be adduced where such notice had been allowed; that the defendant having sworn that he had received no notice or intimation of the action, it could not be presumed that the returned letter had been opened by him, and, at least, that the plaintiff should have produced an affidavit of the letter-carrier that he delivered it.

Lord Chief Justice MANSFIELD.—Your client, knowing the attorney's hand-writing, from having before received process from him, and fearing the contents of the letter, refused to take it in;—it was his own fault therefore that he had not notice.

The other judges concurring,

Rule discharged.

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WATSON v. STEDMAN.

Friday, Nov. 12.

Mr. Serjt. *Best* had, in a former term, obtained a rule calling on the plaintiff to shew cause why the writ of *capias* in this action should not be quashed, on the ground that the defendant was on board his ship at *Rotherhithe*, which is in *Surrey*, when the writ, which was directed to the sheriff of *Middlesex*, was served on him.

The court will not quash a writ, on the ground of its having been served in a wrong county.

Mr. Serjt. *Shepherd*, in shewing cause, contended that though the *service* were bad, the writ itself might have been good, and therefore that the motion to quash the writ was improper.

Mr. Serjt. *Best*, *contra*, contended that the motion was right, the plaintiff having by his improper service made the writ itself bad:—But the court held, that though the defendant might move to set aside any subsequent proceedings, he could not move to *quash the writ*.

Rule discharged.

1813.

Friday, Nov. 12.

SPARROW V. THE EARL OF BRISTOL.

An outgoing tenant having agreed to assign the remainder of his term to the incoming tenant, the sheriff, before an actual assignment made, may, under an execution against the outgoing tenant, sell his interest in such remaining term, and set upon it the same value that the incoming tenant had agreed to give for it.

THIS action was brought against the defendant as chief steward of the liberty of *Bury St. Edmonds*, for a false return to a writ of *fieri facias*. The writ had been issued against the effects of *George Smith*, who held a farm as a yearly tenant under the Duke of *Grafton*, and had received, prior to *Michaelmas* 1811, a year's notice to quit at *Michaelmas* 1812. One *Rogers*, who was to succeed *Smith* in the farm, agreed with him sometime before *Michaelmas* 1811, for the immediate occupation of it; and it was also agreed that *Rogers* should take the hay, dung, &c. at a valuation, which valuation was to include *Smith's* interest in the remainder of his term. Before, however, the valuation was made, viz. on the 18th of *October* 1811, the officer entered with his warrant under the writ issued by the plaintiff, and which was indorsed, to levy £1176 : 14s.; but, on receiving a notice from *Rogers* that he was in possession of the property, which he said had been valued to him, he returned that he had taken goods to the amount of £256 : 4s. : 9d. and *nulla bona ultra*.

The cause came on to be tried at the last spring assizes at *Bury*, when it was ordered by the court, with the consent of both parties, that a verdict should be entered for the plaintiff for £1200, subject to the award of *H. Hulton*, Esq. in the usual form. Mr. *Hulton* made his award on the 10th of *May*, by which he directed a verdict to be entered for the plaintiff for £606 : 6s. of which £200 were for *Smith's* interest in the farm, and the rest for the hay and other effects according to the valuation.

In *Easter* term, Mr. Serjt. *Shepherd* had obtained a rule, calling on the plaintiff to shew cause why Mr. *Hulton's* award should not be set aside, or referred back to

him to be reviewed, and meanwhile the proceedings be stayed. His motion was made on two grounds: 1st. That the property had changed its owner prior to the officer's entry; 2dly. That *Smith's* interest was not such as the sheriff could take in execution; and, if it were, that he ought not to be charged with £200, the value put upon it by *Rogers*, but only with so much as it would have sold for to an indifferent person.

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Mr. Serjt. *Blossett* now shewed cause against this rule, upon affidavits, which stated that the arbitrator had found that the property had been taken in execution prior to the change of possession, and that £200 were the real value of *Smith's* interest in the farm; and these being the questions on which the cause was referred, he contended that the award was right and conclusive.

Mr. Serjt. *Shepherd, contra*, contended that the sheriff might as well have been fixed for the good-will of a man's business, and distinguished this from the case of a lease which might have been sold; but, at all events, the sheriff ought not to be charged with the sum which the incoming tenant might think it worth to himself.

Lord Chief Justice MANSFIELD.—Any man who wished to have got the remainder of this term would have given *something* for it; and it was worth, therefore, just so much as would have been given for it:—A man might have bought it for the purpose of vexation towards the incoming tenant. [Mr. Serjt. *Blossett* observed, that in this case the crops passed for £200.] That puts an end to the question; but even without that, there would have been much difficulty in supporting this rule.

The rest of the court concurred.

Rule discharged (a).

(a) The sheriff may take and sell an annuity in nature of a rent-charge, and he may extend and sell a term of years; but nothing can be taken in execution which cannot be sold. *Com. Dig. tit. Execution, (C. 4)*

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Saturday,
Nov. 13.

BYNE v. MOORE.

An action for a malicious prosecution in indicting the plaintiff for an assault and battery, where the bill has not been found, cannot be supported without evidence of *express malice*, as well as of the want of probable cause.

THIS was an action for a malicious prosecution in indicting the plaintiff for an assault and battery. The only evidence on the part of the plaintiff being, that the bill was preferred and not found, Lord³ Chief Baron *Macdonald*, who tried the cause, nonsuited him.

Mr. Serjt. *Best*, in a former term, had obtained a rule *nisi* to set aside this nonsuit, on the ground that the bill not having been found, malice was to be presumed till the contrary were shewn.

Mr. Serjt. *Shepherd* now shewed cause against the rule, and contended that unless the charge contained scandal, or the plaintiff could shew damage, he could not recover. He cited *Lilwal v. Smallman* (a), which was an action for a malicious prosecution in indicting the plaintiff for stealing a shovel; and an objection being made that express malice was not proved, Mr. Justice *Forster* overruled the objection, observing, that "in indictments for *felony*, the defendant could not object that express malice had not been proved, but in indictments for *misdemeanors*, evidence of express malice must be given." In *Saville v. Roberts* (b), the court held, that if the bill were not found, no action lay unless scandal or imprisonment appeared, and even then, express malice must be proved; the mere innocence of the plaintiff not being sufficient. He concluded that this being in fact *damnum absque injuriâ*, the rule should be discharged.

Mr. Serjt. *Best*, *contra*.—The plaintiff's objection was, that the defendant must prove probable cause, the grand jury not having found the bill. In *Saville v. Roberts* the

(a) *Sel. N. P.* 946. n. (1.) 3d edit.

(b) 1 *Salk.* 13.—1 *Ld. Raym.* 374.

judges determined that there were three sorts of damages which could sustain this action:—

1st, Damage to the plaintiff's fame or reputation; 2dly, danger to his life, limbs, or liberty; and 3dly, the expence of defending himself.

If this doctrine were right, the plaintiff was entitled to a verdict, the defendant having charged him with an offence which, if proved, would have subjected him to imprisonment; and it was this danger of imprisonment, not the scandal, on which he relied. It was no answer to the plaintiff's case to say, that he could have received no damage; if the defendant had been put to prove probable cause, he would have made out his claim to a verdict, whatever might have been the amount of the damages given. He cited *Buller's N. P.* 14.

Lord Chief Justice MANSFIELD.—I cannot see what damage a man can sustain by the preferring a bill of indictment against him which is not found. How then can the law say, that a man can support an action for preferring an indictment against him by which he has sustained no actual damage? It does not appear that the plaintiff's personal security was ever endangered. All that is said in *Buller's N. P.* on the subject is against the present action (a). It would be a very bad precedent if this nonsuit were set aside, as every bill that was

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(a) In general, in this action, the plaintiff must shew both malice and the want of probable cause, and both must concur. *Bull. N. P.* 14. 4 *Bur.* 1974, *per cur.*—Malice may be implied from the want of probable cause, but not the latter from the former. Per Lord Mansfield and Lord Loughborough, in *Johnstone v. Sutton*, in error, 1 *Term Rep.* 545.—In *Incedon v. Berry*, *Devon. Sum. Ass.* 1805, cited *Sel. N. P.* 946. n. (2), 3d edit. in an action for maliciously indicting the plaintiff for perjury, Mr. Justice Le Blanc held, that it was not sufficient for the plaintiff to shew express malice, but he must also give evidence, (though slight evidence would be sufficient) of the want of probable cause.

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thrown out by the grand jury, would become the foundation of an action.

The other judges concurring,

Rule discharged.

Tuesday,
Nov. 16.

FENTUM v. POCKOCK AND ANOTHER.

Nothing will discharge the acceptor of a bill of exchange but payment or release; and therefore he is not discharged by the holder taking a cognovit from the drawer; and its being an accommodation bill makes no difference.

THIS was an action brought by the indorsee of a bill of exchange against the acceptor, and was tried before Lord Chief Justice *Mansfield*, at the sittings at *Westminster* after last *Easter* term, when a verdict was found for the plaintiff with £80 damages, with liberty to the defendant to move to enter a nonsuit, on the ground that the plaintiff had discharged the defendant, by having accepted a cognovit, payable by instalments, from the drawer.

The bill, as appeared on the trial, had been accepted for the accommodation of the drawer, payable at Messrs. *Davison* and Co.'s, *Pall Mall*, who refused payment, saying they knew nothing of *Pockock* and son. The plaintiff had given a valuable consideration for it, and knew nothing of its being an accommodation bill, till after it became due.

Mr. Serjt. *Shepherd* in *Trin.* term obtained a rule *nisi* on the above ground.

Mr. Serjt. *Marshall* now shewed cause against the rule. He contended, that whether the plaintiff knew it to be an accommodation bill or not, or whether in fact it were so or not, made no difference (a). The defendant, he presumed, would rely on the authority of

(a) Vid. *Charles v. Morden*, 1 *Tunn.* 824.

two modern *nisi prius* cases: 1st, *Laxton v. Peat* (a), which was an action under circumstances similar to the present, except that the plaintiff was aware of the bill being for the accommodation of the drawer. In that case, Lord *Ellenborough* held that the acceptor must be considered as *surety* only for the drawer, and nonsuited the plaintiff. The other case was *Collott v. Haigh* (b), in which the question was, whether the drawer of an accommodation bill was discharged by time being given to the acceptor. Lord *Ellenborough* ruled that he was not, and repeated his opinion, that in the case of an accommodation bill the drawer must be considered as the *principal*, the acceptor only as *surety*. But, with all due deference, nothing could be more likely to produce fraud and litigation than the doctrine, that the liability of the acceptor of an accommodation bill, differs in any respect from the liability of the acceptor of a bill for value. He then cited *Kerrison v. Cooke* (c), in which Mr. Justice *Gibbs* questioned the principle laid down in *Laxton v. Peat*. He said that though a distinction was taken in that case, that the bill was presented when due, to the acceptor, who promised to pay it; yet, he contended that this did not vary the case, because a verbal promise could not be said to add to the obligation entered into by the written acceptance.

Mr. Serjt. *Shepherd*, in support of the rule, contended that the plaintiff had put the acceptor in a worse situation by giving time to the drawer. He relied on the authority of *Collott v. Haigh*, above cited, and *English v. Darley* (d), in which Lord *Eldon* said, "if the holder of a bill agree with a prior indorser in the morning not to

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(a) 2 Camp. 185.

(b) 3 Camp. 281.
(d) 2 B. and P. 61.

(c) 3 Camp. 362.

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sue him for some time, and in the evening oblige a subsequent indorser to pay, that subsequent indorser must resort to him to whom the plaintiff has given his faith not to sue." He said there was no distinction between the prior indorser in that case, and the acceptor in this; for if in this case the plaintiff were to recover, he would drive the acceptor to the necessity of suing the drawer, who had received the plaintiff's engagement that he should not be sued. He distinguished this from the case of *Kerrison v. Cooke*, because *there* the acceptor, by the subsequent promise, assented to what had been done; and it was decided, that if the surety, (whether drawer or acceptor,) agreed to time being given to the principal, he waived his right to a discharge (a).

Lord Chief Justice MANSFIELD.—Certainly giving time to the principal discharges the surety; but the difficulty here is to make the acceptor a surety, and the drawer the principal. I agree with Mr. Justice Gibbs in the opinion he entertained of *Laxton v. Peate*, which is the first case in which it has ever been supposed that the acceptor was not the first and the last person compellable to pay the holder. In the character of acceptor, he binds himself at all times to pay the holder, (though not perhaps the drawer,) until discharged by payment or release. I never knew any difference, as to the holder, between an acceptance for value and one for no value. There is this distinction between the present case and that decided by Lord *Ellenborough*, that in this case the plaintiff did not know it to be an accommodation bill when he took it; but, as it appeared to me at the trial, and does now, even if he had known it at the time, that would not alter the case; because, when a man accepts a bill, whether it be to accommodate a friend or not, he makes himself liable to

(a) Vid. *Clark v. Devlin*, 3 B. and P. 263.

the holder until payment or release; and, certainly, one would not wish to pay respect to accommodation bills.

Mr. Justice HEATH.—I cannot concur with Lord *Ellenborough's* decision in *Laxton v. Peate*. Whoever accepts an accommodation bill, in order to make it pass as a bill for value, is guilty of fraud; and I would never concur with any determination which countenances accommodation bills.

Mr. Justice CHAMBER concurring,

The rule was discharged (a).

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another.

(a) See *Dingwall v. Dunster*, Doug. 247; and *Ellis v. Galindo*, there cited.

AIKINHEAD v. BLADES AND OTHERS.

Wednesday,
Nov. 17.

THIS was an action of trespass against the sheriff of *Middlesex* and his officers. The first count of the declaration stated, that the defendants, on the 26th of April 1818, and on divers other days and times between that day and the commencement of this suit, broke and entered the plaintiff's dwelling-house, &c.; and, on the day first mentioned, seized and took the plaintiff's goods, and converted them, &c.: The second count stated that the defendants, on the day and year first above mentioned, broke and entered the plaintiff's dwelling-house, and continued therein for a long space of time, to wit, from thence until the commencement of this suit: The third count was for a common *asportavit*. Plea 1st, Not guilty; 2dly, That the trespasses in the three counts mentioned were the same act, and not different trespasses; and to this a justification under a writ of *testatum fieri facias*

Where the sheriff, by virtue of a writ of *test. fi. fa.* entered the plaintiff's house, sold his goods by auction against the plaintiff's will, and kept possession till after the return of the writ: — held, this was but one continued trespass.

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sued out on the 12th of *February* 1813, and returnable the 1st of *May*; by virtue of which the defendants entered on the said 26th of *April*; and before the return of the writ, took in execution, and sold the goods and chattels of the plaintiff, to the amount of the sum to be levied: 3dly, Leave and licence by the plaintiff. The replication took issue on the first plea; as to the second plea, protesting that it was insufficient in law, alleged that the trespasses in the first, second, and third counts mentioned, were different trespasses, and not the same act; to the third plea it replied, that the defendants of their own wrong, and without the leave or licence of the plaintiff, entered, &c.

The point in question was that contained in the second plea, viz. whether the trespasses in the three counts mentioned, were one and the same or different trespasses. At the trial of the cause at *Westminster*, at the sittings after last *Easter* term, it was proved for the plaintiff, that the defendant entered for the first time, about the 10th of *April*; that the goods were sold by auction on the 26th, against the plaintiff's will; and that possession was kept till the 6th of *May*, which was the day after the return of the writ. Lord Chief Justice *Mansfield*, who tried the cause, was of opinion that this only proved one continued trespass; and the defendants in consequence obtained a verdict. Mr. Serjt. *Shepherd* and Mr. Serjt. *Marshall* now moved to set aside the verdict, on the ground that there were two distinct trespasses. They contended that, though, if the sheriff enter and keep possession under the writ, that is but one continued trespass; yet here his bringing another person into the house, for the purpose of selling the goods against the plaintiff's consent, was to be considered as taking possession for a new purpose, and that he was not warranted in staying in the house after the return of the writ, and after the sale of the goods had taken place. They

cited *Winterbourne v. Morgan* (a), where the entry was by virtue of a warrant of distress for rent, and the defendant having remained on the premises after the five days allowed by the statute (b), for the purpose of removing the goods, which were afterwards sold under the distress, the court held that such continuance after the five days was a substantive trespass. The defendants should have justified to both counts, and the plaintiff would then have been obliged to have new assigned, which in the present case he was not able to do; but having pleaded the trespasses to be the same, the fact was not made out, on which issue was taken.

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Lord Chief Justice MANSFIELD.—In the case cited from *East*, the defendant was bound to remove the goods within five days; the continuing therefore on the premises after that time was a distinct trespass; but in the present case, who can fix the period when the first trespass ceased, and the second began?

The other judges concurring in the opinion of the Chief Justice,

The rule was discharged.

(a) 11th *East*, 395.(b) 2 *W. & M. stat.* 1. c. 5. & 11 *Geo. 2.* c. 19. s. 10.

LEAR v. HEATH.

Thursday,
Nov. 18.

IN this action, the defendant, who was an under-writer, had been arrested on a policy of insurance for the amount of his subscription, as for a total loss.

If an under-writer be held to bail for the amount of his subscription to a policy of insurance, the court will order the bail-bond to be cancelled, and the plaintiff to pay the costs.

Mr. Serjt. *Shepherd*, on a former day in this term, had obtained a rule, calling on the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled, and the defendant be discharged, on entering a

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common appearance, and why the plaintiff should not pay the costs; there having been no adjustment or promise to pay, and such arrest being contrary to a rule of the court.

Mr. Serjt. *Lens* and Mr. Serjt. *Pell* shewed cause upon an affidavit, which stated that the plaintiff, who was master as well as owner, had done all that lay in his power to prevent a total loss, but was only able to recover the sum of £87, as the net proceeds, which he was entitled to retain for his loss of time as master. They contended, therefore, that there could be no question, but this was a total loss, and that therefore the sum to be recovered was certain, and that the underwriter having offered to pay £80 *per cent.*, (which was refused by the plaintiff, on the supposition that the whole was recoverable,) this offer, though not an actual adjustment, must be considered as an admission of the debt, and equivalent to an adjustment. [Mr. Justice *Heath* observed, that the defendant had been held to bail for the whole amount of his subscription, whereas the offer was only to pay £80 *per cent.*] That the plaintiff must answer in another way, but it was no ground to set aside the bail-bond, that he had held the defendant to bail for more than was due. The underwriters having declared that they would only pay £80 *per cent.*, and that if that were refused, they would not settle at all, the plaintiff was only using the means which common prudence would suggest, to recover the debt. As there was no decided authority against holding to bail in case of a total loss, the rule should be discharged, but at all events the plaintiff ought not to be compelled to pay the costs. Arrests on policies had been made in the *King's Bench*; and in *Impey's Practice* (a) there was a form of holding to bail in that court, even on average losses.

Mr. Justice *Heath* suggested, that in those cases, there might have been adjustments.

Mr. Serjt. *Shepherd*, in support of the rule, cited *Lambe v. Dubois* (a), by which it appeared to be contrary to the practice of this court to arrest on policies of insurance. He denied that there had ever been a decision in the *King's Bench* in favour of such a practice, but he was sure they had decided that there could be no arrest where it was a question of unliquidated damages.

Lord Chief Justice MANSFIELD.—The rule must be made absolute; and as to the costs, the plaintiff should know the practice of the court, and if he venture to arrest improperly, must pay the costs.

The other judges concurring,

Rule absolute.

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(a) *Hil. 51 Geo. 3. Feb. 7. MS.*—In this case there had been a total loss, the policy was a valued one, and all the under-writers, except the defendant, had paid the loss: The court, however held that, without an adjustment or express promise, an underwriter could not be held to bail on a policy of insurance, which is a contract of indemnity.

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FOULKES AND ANOTHER, EXECUTORS, &c. v. NEIGHBOUR.

Thursday,  
Nov. 18.

THE plaintiffs in this action were executors of the will of one *Kenebel*, who, at the time of his death, was holder of a bill of exchange for £50, which had been indorsed to him by the defendant. On the back of the bill was this memorandum or indorsement, "*August 25th, forty pounds,*" which, however, had been struck through with a pen. The executors, finding no memorandum in the deceased's books of any payment, though there was one of the bill's dishonour, and of notice having been sent to the defendant of such dishonour, arrested the defendant

Where a man sues as executor, the court will require a strong case against him, to subject him to costs within the meaning of the stat. 43 Geo. 3. c. 46, s. 3.



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for the whole amount. On the trial before the Chief Justice, at the sittings at *Westminster* after last *Trin.* term, the defendant called the acceptor of the bill, who swore, that he had paid £40, a fortnight after the bill became due, to the testator, who had given him time for the remainder; and the plaintiffs accordingly only recovered the £10 remaining due, with interest for the same.

Mr. Serjt. *Best*, on a former day in this term, had obtained a rule, calling on the plaintiff to shew cause why the defendant should not have his costs taxed by the court, and set against the damages recovered by the plaintiff, according to the stat. 43 *Geo.* 3. c. 46. s. 3 (a).

Mr. Serjt. *Shepherd* now shewed cause against this rule. The question on these motions was, whether the plaintiffs had been guilty of a malicious arrest. Finding that no memorandum had been made by the testator of payment, they did not consider themselves justified in

(a) This section enacts, "That in all actions wherein the defendant shall be arrested and held to special bail, and wherein the plaintiff shall not recover the amount of the sum for which the defendant, in such action, shall have been so arrested, &c. such defendant shall be entitled to costs of suit, to be taxed according to the custom of the court in which such action shall have been brought; provided that it shall be made appear to the satisfaction of the court, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not any reasonable or probable cause for causing the defendant to be arrested and held to special bail in such amount as aforesaid, and provided that such court shall thereupon, by a rule or order of the same court, direct that such costs shall be allowed to the defendant; and the plaintiff shall, upon such rule or order being made as aforesaid, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed, and then in such sum only as the same shall exceed, the amount of the taxed costs of the defendant in such action: and in case the sum recovered in any such action shall be less than the amount of the costs of the defendant to be taxed as aforesaid, that then the defendant shall be entitled, after deducting the sum of money recovered by the plaintiff in such action from the amount of his costs so to be taxed as aforesaid, to take out execution for such costs, in like manner as defendants may now by law have execution for costs in other cases.

giving the defendant credit for £40, on the mere strength of the indorsement above stated, which had been struck out by the testator, and which they therefore considered as having been made merely in expectation of payment; and in this supposition they were warranted by the evidence of the acceptor, who stated that he had paid the £40, a fortnight after the bill became due, whereas the indorsement was dated two days after. It could not therefore be said that the plaintiffs had acted maliciously in arresting the defendant.

Mr. Serjt. *Best contra*, contended that the plaintiffs were very hasty in arresting the defendant, notwithstanding the indorsement; if justified in suing at all, they should not have held to bail. It had often been said by the courts, that no arrest should be made where there was not an absolute necessity; to justify this arrest, therefore, the plaintiffs should shew that they considered the case desperate.

The Chief Justice, however, was of opinion that the rule should be discharged, in which the rest of the court concurred; and Mr. Justice *Heath* observed that it must be a strong case against an executor, to bring him within the meaning of the act.

Rule discharged.

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another,
Executors, &c.
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NEIGHBOUR.

LAMB v. REASTON, et al. DEFORCIANTS.

Friday,
Nov. 19.

ON a motion to amend a fine, it appeared by the deed for leading the uses of the trust, that *Mary Reaston*, one of the deforciants, and wife to the other deforciant, was, in her lifetime, seised in fee of undivided shares in certain hereditaments situate in that part of the parish of *A.* instead of that of *B.*, in which the lands intended to be passed are erroneously described to have been situated; it appearing that the parties had no such lands in *B.*, and their intention to pass the lands in *A.* being shewn by describing them as having been in the possession of different occupants; though there be no general words in the fine, and though the deed to lead the uses contain the same mistake as the fine.

The court will amend a fine, by inserting the parish of *A.* instead of that of *B.*, in which the lands intended to be passed are erroneously described to have been situated; it appearing that the parties had no such lands in *B.*, and their intention to pass the lands in *A.* being shewn by describing them as having been in the possession of different occupants; though there be no general words in the fine, and though the deed to lead the uses contain the same mistake as the fine.

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 LAMB  
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 et ux.  
 Deforciant.

the parish of *St. Paul Deptford*, which is in the county of *Surrey*; and also of the reversion in fee, expectant on the decease of her father, *Samuel Dodington*, of a certain other undivided share in the said hereditaments; and being so seised, by indenture, dated 23d of *Jan.* 1810, between *F.B. Reaston* and *Mary* his wife of the first part, and *William Lamb* (the plaintiff) of the other part, the deforciant covenanted with the plaintiff, that they would levy a fine to him and his heirs, "of all the estate and interest whatsoever of her the said *Mary Reaston*, whether in possession, reversion, remainder, or expectancy, in certain tenements situate in *Camberwell*, and in the parish of *Camberwell*, in the county of *Surrey*, or in either of those places; and also in one acre and two roods of arable land; and also in several closes of meadow or pasture ground, in the manor of *Little Hatcham*, formerly in the occupation of *I. H.*, then of *I. T.*, since of *I. L.*, afterwards of *E. B.*, and then of *Mary Tadman*; and also in a piece of meadow ground, situate in *Camberwell* aforesaid, and in the parish aforesaid, or in either of those places, formerly in the occupation of the said *I. T.*, then of the said *I. L.*, since of the said *E. B.*, and then of the said *Mary Tadman*," to and upon the uses thereafter mentioned: In pursuance of which covenant, a fine was levied between the said parties, as of *Hilary* term, 50th *Geo.* 3. After the decease of the deforciant *Mary Reaston*, and of her father, it was discovered that so much of the hereditaments as in the indenture were described as situated in *Camberwell*, in the county of *Surrey*, was in fact situated in that part of the parish of *St. Paul Deptford*, which is in the county of *Surrey*.

Mr. Serjt. *Shepherd*, on a former day in this term, had obtained a rule *nisi* to amend the fine, by inserting the words "*St. Paul Deptford*," in the room of the word "*Camberwell*," on an affidavit of the parties, that it was the intention of the deforciant to limit and settle so much of the hereditaments as were described to be situated

in *Camberwell*, but which in fact were situated in *St. Paul Deptford*, to the uses in the indenture set forth; that the hereditaments so erroneously described were, at the date of the indenture, in the occupation of *Mary Tadmán*, and had been in that of the other occupants therein mentioned; and that *Mary Reaston* never had any estate or property in the parish of *Camberwell*, as described in the indenture, nor of any other description, except one acre in the occupation of a *Mr. Fox*. In support of his motion, he said there had been many applications of the same sort, and it had always been decided, that the court had nothing to do with the injury sustained by the heir; all that the court had to inquire was, whether there were sufficient description to pass the lands. He cited *Treggare v. Gennys* (a), in which case there was a rule of court to amend the fine, it appearing that "by the omission or misprision of the clerk, who made and engrossed the præcipe and concord of the fine, he supposed the tenements to lie in the parish of *Lanceston*, when in fact there was no such parish in the whole county of *Cornwall*, but it ought to have been the parish of *St. Stephens*, near *Lanceston*."—He said, there was no difference between putting a wrong parish, and one which had no existence. He also cited *Craghill v. Pattinson* (b), where the court ordered the fine to be amended according to the deed of uses, by changing *parochiis* to *parochia*, and by inserting the words "*et Melmerby*;" though the motion was opposed by the heir, who claimed the lands if not barred by the fine (c).

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 LAMB
 v.
 REASTON,
 et us.
 Deforciantis.

(a) *Piggott on Recoveries*, 218.

(b) *Barnes*, 410. ed. 24.

(c) See *Loggen v. Rawlins*, *Barnes*, 410. ed. 21, where a recovery, suffered nine years before, was ordered to be amended, by putting the name of a vill into its proper place, according to the deed of uses, it having been put into the recovery as an advowson, instead of a vill in which the lands lay. In that case, the court held, that the intention of the parties was the foundation for the amendment; and that the deed of uses was the instruction for a recovery, as a præcipe for an original writ. See also 2 *Taun.* 1. *Gladwyn v. Brown*.

1813.

 HINDAL
 v.
 BLADES, Sheriff.

one of the sureties had become bankrupt, and had paid nothing, and there was no evidence of his having acquired any property afterwards; but on the other hand it was proved, that he was considered in good credit by his neighbours at the time of giving the bond. Lord Chief Justice *Mansfield*, who tried the cause, told the jury that it was sufficient for the sheriff, if the sureties were apparently responsible men; and they accordingly found for the defendant.

Mr. Serjt. *Shepherd* now moved to set aside the verdict, on the ground of the judge's direction being wrong. He contended that under the statute of 11 *Geo. 2. c. 19 (a)*. which was made to prevent vexatious replevins, the sheriff was bound to make inquiries into the real situation and responsibility of the sureties, and that it was necessary that they should be really, as well as apparently, responsible at the time of taking them. The landlord had no information who they were, and therefore had no mode of ascertaining their insufficiency; but the sheriff might object to them, and should demand evidence of their sufficiency. If an action were brought against the sheriff for refusing to take sureties, he would be justified if they did not prove themselves actually responsible.—A man might be an uncertificated bankrupt, and because he was carrying on business, would be apparently responsible; but he would not therefore be fit to be trusted. The only case exactly in point was *Saunders v. Darling (b)*, where it was held, that "some evidence must be given by the plaintiff of the insufficiency of the sureties, but very slight evidence is sufficient to throw the proof on the sheriff, for the sureties are known to him, and he is to take care that they are sufficient."

(a) Sect. 23 enacts, that "the sheriff, &c. may and shall, in every replevin of a distress for rent, take, in their own names, from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained," &c.

(b) *Buller's N. P.* p. 60.

Lord Chief Justice MANSFIELD.—The only question here is, what shall be considered such a degree of responsibility as shall discharge the sheriff; whether it be necessary that the sureties should be worth so much, or merely that they should be responsible in the opinion of the world? I cannot think the act meant to throw on the sheriff the burthen of proving the sureties to be worth so much property, or of going into a man's house to ascertain his responsibility by casting up his accounts. I think it is sufficient for him, if the sureties be considered responsible and trustworthy by their neighbours.

Mr. Justice HEATH.—I am of the same opinion. It would be too much to expect the sheriff to make inquiries into the private affairs of the sureties.

Mr. Justice CHAMBERE absent.

Mr. Justice DALLAS.—The sheriff is to take sufficient sureties; and in this case evidence was given that they were considered responsible. It would be too great a burthen on the sheriff, to be obliged to know more of a man's affairs than the neighbours with whom he deals.

Rule refused.

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HINDAL
v.
BLADES, Sheriff.

CRUTCHLEY v. MANN.

Saturday,
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THIS was an action on a bill of exchange, dated 5th of May 1812, drawn by *Arthur Clarence*, in *Jamaica*, on the defendant, in *London*, and was tried before Lord Chief Justice *Mansfield*, at the sittings in *London* after last *Trinity* term. The first count of the declaration stated the bill to be payable to the plaintiff, and accepted by the defendant: The second stated it to be payable "to payee, without any other authority than a letter from *B.* promising to accept it; but, having the address torn off, and containing nothing to shew to whom it was addressed:— held, 1st, That this was not evidence to shew that *C.* was the payee of the bill;—and 2dly, That though the bill might not require an *English* stamp, the letter, had it been sufficient, being a separate contract, would require a stamp.

A. in *Jamaica*, draws a bill on *B.* in *London*, on a *Jamaica* stamp, leaving the payee's name in blank. *C.* gets possession of the bill, and inserts his own name as

to accept it; but, had it been sufficient, being a separate contract, would require a stamp.

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——— (meaning to the order of such person as the said *Arthur Clarence* should afterwards cause to be named and inserted in the bill to be the payee thereof);” and averred, that *Clarence* afterwards appointed the plaintiff to be the payee thereof, and that the defendant accepted it: The third stated, that the plaintiff was lawfully possessed of a certain bill, drawn by *Clarence* upon the defendant, payable to the order of the plaintiff; and that the defendant undertook, on the same being presented to him for acceptance, to accept the same in writing, but refused to accept it. The name of the payee had been left in blank; and it appeared that the plaintiff had received it from the captain of a vessel which had lately arrived from *Jamaica*, who had received it from *Clarence*, and the name of the plaintiff had been inserted in his own hand-writing. The bill had a *Jamaica* stamp upon it. There was no acceptance on the face of it; and the only evidence of the defendant having accepted it was a letter from him, with the direction torn off, and without any thing in the body of it to shew to whom it was addressed, to the following effect:—

‘ DEAR SIR,

Mr. *Clarence*, the bearer of this, has just been with me on the subject of my refusing to accept his bill on me for £200. The explanation he has given me is so perfectly satisfactory, that, upon its being again presented, I shall feel no hesitation in paying respect to it; and am sorry that my refusal should have put you to any inconvenience.’

On the part of the defendant, *Clarence*, the drawer, was called, and stated, that he had never authorized the plaintiff to insert his name in the bill. The Chief Justice left it to the jury to say, whether this letter were evidence of any authority from the drawer to the plaintiff to insert his name, reserving two points for the consideration of the court: 1st. Whether the bill ought not to have had

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an *English* stamp, it not being an effective bill of exchange till the insertion of the payee's name, which took place in *England*; 2dly. Whether there were sufficient evidence that the plaintiff had authority to insert his name, or that the bill was that to which the letter alluded. The jury found for the plaintiff; and Mr. Serjt. *Shepherd*, on a former day in this term, obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

Mr. Serjt. *Bert* now shewed cause, and contended, first, that the *Jamaica* stamp was sufficient; for there being no payee on the bill, it would have been payable to the bearer, according to *Snaith v. Mingay* (a), in which the court of *King's Bench* held, that where a bill of exchange was sent over from *Ireland*, with blanks for the date, sum, time of payment, and name of the drawee, to be filled up and negotiated in *England*, it was to be considered as relating back to the time of signing and indorsing it in *Ireland*, and that therefore an *English* stamp was not necessary. So here, though the bill was to be completed in *England*, it was still a *Jamaica* bill, and was to refer back to the time of drawing it in *Jamaica*.—[Lord Chief Justice *Mansfield*.—It can only be considered as waste paper till filled up in *England*.]—As to the second point, he contended, that the bill, being sent to the plaintiff in blank, must be considered as having been sent for the purpose of introducing his name as payee. He compared this case to that of *Russel v. Langstaffe* (b), where the *King's Bench* held, that an indorsement of a blank note, &c. was binding on the indorser, for any sum and time of payment which the person to whom he entrusted it chose to insert in it. On the same principle, that the sum and time of payment might be inserted, the name of the payee might be introduced, and the giving the bill in blank to any one, was giving that person authority to do so.

(a) 1 *Maule and Sel.* 87.

(b) *Doug.* 514.

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Mr. Serjt. *Shepherd contra*, distinguished this case from that in *Moule and Selwyn*, in which, he said, express authority must have been given by the drawer to the person filling up the instruments. At all events, that case only decided that, if a bill were drawn abroad, and accepted in *England*, it was not necessary to have an *English* stamp. But here, if the letter were to be considered as an acceptance at all, the defendant had made himself liable by an additional written document, which must be stamped to give it validity. The reason why *English* stamps were not required on foreign bills was, that the use of them could not be enforced abroad. In this case, a new contract had been entered into in *England*, which, therefore, he might and ought to have had stamped. As to the other point, he contended, that the plaintiff having received the bill from the person to whom the drawer had given it, was no evidence of his being authorised to insert his name; and that the letter having no direction on it, there was nothing in that from which to infer such authority: He had merely got possession of the letter, without being able to shew any connexion with the drawer; this, therefore, was not similar to the case in *Douglas*.

Lord Chief Justice MANSFIELD.—If the letter is to be considered as an acceptance, being a separate contract, it ought to have been stamped. As to the other point, the plaintiff ought to have proved that he was authorized to insert his name as payee; if he were to recover, as the case now stands, I do not know how the defendant could charge the drawer with the value of the bill. The drawer might say, this was not the instrument which he delivered to the person from whom the plaintiff received it.

The rest of the court concurring (a),

Rule absolute.

(a) Mr. Justice Chambre was absent from illness.

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MARINGTON and others v. MACMORRIS.

THIS was an action on the money counts, brought to recover the sum of £161: 15s. being the sterling amount of different sums of *Indian* money, due from the defendant to the plaintiffs as *East India* agents. The defendant pleaded the general issue, paid the sum of £67: 12s. into court, and gave a notice of set-off, of which the following was the particular, delivered under a judge's order:—

“ April 23, 1813.

“ Paid *Robert Dashwood*, esq. under a foreign attachment against the present defendant, founded on a “plaint or suit in the mayor's court of *London*, brought “by the said *Robert Dashwood* against the plaintiff in this “cause, being the amount, or part of the amount, of a “debt at that time owing by the present defendant to the “present plaintiff in this cause; £112: 10s.”

The particular of the defendant's set-off is not admissible evidence of the existence of a debt from the defendant to the plaintiff.

A debt incurred in foreign coin is recoverable as for lawful money of Great Britain. It is no ground for impeaching the regularity of a foreign attachment, that the debt was contracted, or the parties resided, abroad.

On the trial, the only evidence of the existence of a debt from the defendant to the plaintiffs, beyond the money paid into court, was the above particular, which Lord Chief Justice *Mansfield*, who tried the cause, permitted to go to the jury, with leave to the defendant, if the verdict should be against him, to move to enter a nonsuit, on the ground of its being inadmissible evidence. The jury considered the set-off as an admission of the debt; and being of opinion that the judgment on the foreign attachment was irregularly obtained, no summons or notice having been served on the defendants in that suit (the present plaintiffs), they found a verdict for the latter for £112: 10s.

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Mr. Serjt. *Lens*, on a former day in this term, obtained a rule *nisi* to set aside the verdict and enter a nonsuit. He moved on three grounds:

1st. That the debt having been incurred in *Indian* coin, no value in *English* money having been set upon it, the plaintiffs could not recover it as for *lawful money of Great Britain*;—but this objection was over-ruled at once by the court:

2dly. That the particular of set-off was not admissible evidence of the existence of a debt; which was the point reserved at the trial:

3dly. That the attachment in the mayor's court was regular, though there had been no actual summons, and consequently was a good discharge of the debt. He said, it would destroy the whole proceeding in foreign attachment, if an actual summons were necessary; because it was on the fiction of summoning the real defendant, who made default, that the garnishee was summoned (a).

Mr. Serjt. *Best* now shewed cause against the rule; and as to the second point made by the other side, (the first having been over-ruled), he contended that the particular, which had been admitted to prove the existence of a debt, was not to be considered in the light of a plea, nor even of a notice of set-off in the place of a plea, but merely as a paper passing in correspondence in the course of the cause, which had only been introduced by the laxity allowed in pleading, and which the plaintiffs would be at liberty to give in evidence on another trial, if the defendant succeeded in his present motion. A particular of set-off, he contended, was no more a plea of set-off, than the particular of the plaintiff's demand was a declaration; nor could it be considered as on a footing with the records of the court. As to the last question, he

(a) See *Turbill's* case, 1 *Saund.* 67, n. (1.) and *Fisher v. Lane*, 2 *Wils.* 297, and 2 *Bl. Rep.* 234, there cited.

was about to argue against the regularity of the attachment, 1st. because the defendant in the attachment had not been summoned; and 2dly. because the mayor's court has no jurisdiction over debts contracted abroad; but he was interrupted by the Chief Justice, who suggested that it would be better to hear the other side on the former question, before the latter should be discussed; observing, however, that it had been decided, that the circumstances of the debt having been contracted, and the party residing out of the jurisdiction of the mayor's court, were immaterial.

Mr. Serjt. *Lens* then submitted, that it was an established rule that pleas, which were distinct, should be kept distinct; and that as one ground of defence could not be prayed in aid to support another, so neither could the plaintiff avail himself of one plea, to contradict what was contained in another.

Lord Chief Justice MANSFIELD.—There is no doubt but that parties may set off mutual debts (a); and, for the sake of convenience, notice is given instead of a plea, but it must be acted upon as a plea. Being given in general terms, it might be unintelligible to the plaintiffs without an explanation; the plaintiffs, therefore, called on the defendant to give the particulars, which have the same effect as if stated in a notice or plea of set-off. The plaintiff cannot avail himself of what is stated in one plea, to contradict what is stated in another. A special plea in trespass would contradict the general issue; and I cannot distinguish between the particular of a set-off and a plea. I think, therefore, this was not admissible evidence.

Mr. Justice HEATH was of the same opinion, and cited *Lapworth v. Wast* (b), in which the *vicinetum* of the jury

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(a) See stat. 2 Geo. 2, c. 22, s. 13. made perpetual by 8 Geo. 2, c. 24, s. 4.—(b) *Cro. Jac.* 86, and *Yelv.* 77.

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was mistated, it having been only from one place, whereas there were issues arising in two different places. The plaintiff, however, contended, that the defendant having confessed that the place which was omitted, was in the same parish as that from which the venire was awarded, the process was right; but the court held, that what was stated in one plea did not aid what was stated in another. Here we must consider the notice of set-off the same as if it had been pleaded.

Mr. Justice DALLAS.—The only question is, whether the particular of a set-off be distinguishable from a plea; I think it is not, and that this case, therefore, is similar to that cited by my brother *Heath*.

Mr. Justice CHAMBER was absent.

Rule absolute.

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Nov. 20.

WALKER v. BARNES.

The drawer of a bill is only bound to pay within reasonable time, after receiving notice of its being dishonoured;—therefore, where he received notice the day after the bill became due, a tender on the following day was held to be in time.

THIS was an action on a bill of exchange, drawn by the defendant, payable to himself or order, accepted by J. S. indorsed by the defendant to the plaintiff, and, on presentment for payment, dishonoured. The defendant pleaded *non assumpsit* as to all but £10, and a tender of that sum; and issue was taken on that fact. On the trial of the cause at the sittings at Westminster after last Trin. term, before Lord Chief Justice Mansfield, the plaintiff's case being proved, evidence was given on the defendant's part of the £10 having been sent by him to Mr. Smith, the plaintiff's attorney, on the 13th of June, the bill having become due on the 11th. Smith's clerk refused to receive it, alleging that he had a further demand of three guineas, being the costs of issuing a writ against Spence, the acceptor. A notice, dated the 12th of June, was put in

and read, sent by *Smith* to the defendant, informing him that the bill had been dishonoured, and was in his hands. *Smith's* clerk denied the tender: the jury, however, believed it, and found a verdict for the defendant.

Mr. Serj. *Best*, on a former day in this term, had obtained a rule *nisi* to set aside the verdict, on the ground that the tender had been made too late; and in support of the objection, he cited *Hume v. Peploe* (a).

Mr. Serjt. *Shepherd* now shewed cause; and he distinguished this case from that of *Hume v. Peploe*, above cited. In the latter case the defendant did not plead that he was *tout tems pris*, but only that after making the promise, &c. and after the expiration of the time appointed for the payment of the bill, and before the action commenced, viz. on a day subsequent to the day of payment, he was ready and willing, and offered to pay; and to be sure that was not sufficient: But here the objection was, that in point of fact the tender came too late. On this principle, no man would be safe on buying goods, unless he tendered the instant after the purchase. He contended that issue having been taken on the tender only, the plaintiff could not now object that the defendant had not been always ready; and if issue had been taken on that point, there would have been enough for the jury to have inferred that the defendant had been always ready (b). He contended, that a tender, at any time before action brought, was sufficient, unless where there had been a previous demand and refusal; and that this case was different from that of an action on a deed, where the party must shew that the very terms of the deed had been complied with. If this were not sufficient, no tender would be good after the plaintiff had a right to bring his action, which he might have done,

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(a) 2 East. 168.—(b) But see *French v. Watson*, 2 Wils. 74, where the court decided, that the question, whether the defendant had been always ready to pay, was not issuable:

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in this case, immediately after notice of non-payment by the acceptor.

Mr. Serjt. *Best*, *contra*, contended that the drawer, having undertaken that the acceptor would pay on a certain day, became liable immediately after the acceptor's default, and that the holder was entitled to interest, in the shape of unliquidated damages, for the time beyond the day on which the bill became due, and there could be no tender of unliquidated damages. The breach of contract could not be cured by any tender made after the day on which the bill became due. The rule was the same, whatever might be the amount of the damages, or the length of time elapsed. In this case, the plaintiff was only entitled to ask for nominal damages by way of interest; but supposing the bill to have been to a larger amount, or a month to have elapsed from the time of its becoming due, would the plaintiff then have been barred from recovering his damages for interest? A plea of tender could never be good, unless it fully answered the plaintiff's right of action; here it did not. He contended that this did not resemble the case of a sale of goods, but might be compared to that of money payable on bond on a day certain (a). As to the notice of dishonour, though it was true that the drawer became liable only from the time of such notice, yet he was liable for interest from the day on which the bill became due.

Lord Chief Justice MANSFIELD.—This is an action by the indorsee of a bill of exchange against the drawer, whose undertaking is to pay the holder, on failure by the acceptor. When the bill is dishonoured, the drawer

(a) See stat. 4 Ann. c. 16. s. 12; which enacts that in debt on bond, conditioned for payment of a less sum at a day or place certain, if the defendant, before action brought, have paid the principal *and interest*, though not strictly according to the condition; such payment may be pleaded in bar of the action, as if made at the day and place according to the condition.

cannot find out by inspiration who is the holder, and therefore cannot pay it till he has notice of the dishonour. When he has received notice, he is bound to pay within reasonable time, and, if he do not, will be answerable for damages. The bill became due on the 11th, on the 12th he received a note from the plaintiff's attorney, informing him of the dishonour, and on the 13th he tenders. Is not this a reasonable compliance with his undertaking? No jury could give even a farthing damages.

Mr. Justice HEATH was of the same opinion.

Mr. Justice DALLAS.—Here has been no unjust detention of a debt, for which damages can be demanded. The defendant has done all that was in his power; he was only bound to tender after he received notice of the dishonour, and he did so as soon as possible.

Mr. Justice CHAMBRE was absent.

Rule discharged (a).

(a) See 1 *Williams's Saund.* 33. n. (2.)

GIBSON and others v. MAIR.

Saturday,
Nov. 27.

THIS was an action on a policy of insurance, dated the 20th of May, 1806, on the *American* ship *Washington*, at and from her arrival twenty-four hours on the coast of *Africa*, during her stay and trade there, and till the delivery of her cargo at *Charleston*, in *South Carolina*. The ship sailed from *Liverpool* on the 2d of June, arrived in *August* in the river *Congo*, and during her stay there, on the 9th of *August*, was taken by the *Prince of Orange* though the ground of condemnation do not appear in the sentence. A neutral meeting by agreement a *British* vessel, for the purpose of receiving gunpowder and arms, is illegal, though the latter should have had a license to export them for the purposes of trade.

A sentence of condemnation of a neutral, by a *British* vice-admiralty court abroad, is sufficient evidence, from which to presume that the ship condemned had been engaged in some illegal transaction;

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British privateer, which carried her to *Surinam*, where she was condemned. The plaintiffs averred the loss to have been, 1st, By unlawful seizure; 2dly, By barratry. The cause was tried before Lord Chief Justice *Mansfield*, at the sittings after last *Trin.* term, at *Guildhall*, when the plaintiff called a witness, who stated that the boatswain of the *Washington* had been put in irons after the ship's seizure by the *Prince of Orange*, charged with an attempt to rescue and run away with the vessel. On his cross-examination, he said they had met the ship *Croydon*, by agreement, in the river *Congo*, which supplied them with gunpowder and muskets for the purpose of trading in slaves. On the part of the defendant, the sentence of condemnation was read, and the stat. 29 *Geo.* 2. c. 16 (a); the order in council of the 11th of *May*, 1803 (b), the license to the *Washington* to carry arms sufficient for her

(a) The stat. 29 *Geo.* 2. c. 16. s. 2, enacts, That whatever quantity of saltpetre, gunpowder, arms, or ammunition, prohibited by proclamation or order in council to be exported, shall be shipped on board any ship, in any port of *Great Britain*, in order for exportation, contrary to such proclamation or order, shall be forfeited, and the owner shall forfeit in the proportion of £100 for every cwt. of saltpetre or gunpowder, or for every five and twenty arms; and £100 for every two cwt. of any species of ammunition.

Sect. 3 enacts, That any person aiding or assisting in the shipping any saltpetre, gunpowder, &c. during the time it shall be so prohibited to be exported, shall forfeit £100 and treble the value.

Sect. 4 enacts, That if any master of any vessel shall take on board, or suffer to be taken on board, any saltpetre, gunpowder, &c. for exportation, during the time it shall be so prohibited to be exported, every such master shall forfeit £100.—See also 33 *Geo.* 3. c. 2.

(b) By which it was ordered, "That all ships and vessels, clearing out for the coast of *Africa*, for the purpose of carrying on the trade there, be permitted to take on board, as an assorted part of their cargoes, as much gunpowder, and as large a quantity of trading guns, pistols, cutlasses, and flints, lead balls, bars, and shot, as the exportees shall think necessary; provided that sufficient security be given to the principal officers of his majesty's customs, of the port in which the ships are fitted out, and before they proceed on their respective voyages, in treble the value of the articles exported, that the same shall be expended in trade upon the coast of *Africa*, which security is not to be cancelled until proof of such expenditure has been made by the oath of the captain or master of the ship or vessel, in like manner as is prescribed with regard to spirits and *East India* goods used in carrying on that trade."

defence, but not for the purposes of trade, and the protest of the supercargo, stating that the ship had been seized by the *Prince of Orange* on pretence of having powder and muskets on board, contrary to her licence, were also read.—On this evidence the jury found for the plaintiffs, liberty being reserved to the defendant to move to enter a nonsuit on two grounds: 1st. That there was not sufficient evidence of a loss by barratry; and 2dly. That the condemnation was conclusive evidence against the plaintiffs, of the ship having been illegally employed. The sentence of condemnation was general, without mentioning the grounds of it; and the Chief Justice, at the trial, refused to admit parol evidence of what passed in the court of admiralty, which was attempted to be given, in order to prove that she was condemned for an offence which would have amounted to barratry.

Mr. Serjt. *Lees*, on a former day, obtained a rule *nisi* for a nonsuit on these two grounds.

Mr. Serjt. *Best* and Mr. Serjt. *Vaughan* now shewed cause, and contended that the condemnation could not have been for having gunpowder on board, because the stat. 29 *Geo.* 2. prohibiting the exportation of gunpowder, did not extend to the case of powder taken on board out of this country, [Lord Chief Justice *Mansfield*:—unless the purchase were concerted between the two ships:] and that, by that act, only the powder was forfeited, not the ship; that the boatswain having been put in confinement on a charge of barratry, it was fair to infer that barratry was the ground of the condemnation. They cited the case of the *Dispatch* (a), in which Sir *William Scott* decided, that any resistance to a legal inquiry, which a *British* privateer has a right to make, puts the party resisting in the situation of an enemy, and makes him liable to condemnation. They contended, therefore, that

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 GIBSON  
 and others  
 v.  
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(a) 3 *Robinson's Adm. Rep.* 278.

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the plaintiffs were entitled to recover either on the first counts, as for unlawful seizure, or on the last, as for battery.

The Chief Justice, however, observed that it did not follow, because the master had been charged with battery, that the condemnation proceeded on that ground; and being of opinion that the condemnation was sufficient proof that the ship had been engaged in an illegal transaction, and the other judges concurring, the rule was made absolute for a nonsuit (a).

(a) *Vide postea* the case of *Gibson v. Service*, at *mihi prius*, which was an action on the same policy.

Monday,  
 Nov. 29.

BLANDFORD V. DE TASTET.

The court will not grant an attachment against a witness for not appearing to give evidence according to his *subpoena*, he having attended for two days, in expectation of the cause coming on, and having on the third left the court on his own business, on hearing that some other causes were coming on.

Mr. Serjt. *Shepherd* and Mr. Serjt. *Vaughan* shewed cause against a rule which had been obtained by Mr. Serjt. *Best*, for an attachment against a witness in this cause, for not appearing to give evidence at the trial, according to his *subpoena*. His affidavit stated, that he had attended at *Guildhall* for two days, in expectation of the cause coming on, and that on the third, (on which day the cause was tried,) understanding that there were some special jury causes expected to come on, which would prevent this cause from being tried, he left the court on business of consequence to himself. They contended that this was a sufficient reason for non-attendance, and that a witness was not obliged to attend from day to day till the cause came on.

Mr. Serjt. *Best*, *contra*, contended that it was necessary that he should so attend, and that if business called him away, he ought to apply for leave of absence. He said, this action was brought to recover a sum of money which had been received by the defendant to the plaintiff's use; that this witness was the defendant's broker, and

that the plaintiff, having no means of proving the defendant's hand-writing, but by the evidence of this witness, he had, by this neglect, been obliged to submit to a nonsuit.

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Lord Chief Justice MANSFIELD.—This application is for an attachment as for a contempt of court, and certainly if a person from any ill motive, or even from carelessness, neglect to attend, it is proper for the court to grant an attachment against him, and he is not to judge for himself, as to when and how long he may be wanted. But I think that, in the present case, the party has not been guilty of such a contempt, as calls on the court to grant an attachment against him. He did attend two days, and so far shewed his readiness to obey the *subpoena*; and, though it is not to be avoided, it certainly is a severe attendance which is imposed upon a witness, to be obliged to wait from day to day till the cause comes on; and the party does no more than what is reasonable, if, when he serves the *subpoena*, he tells the witness he will let him know when the cause is likely to come on. Otherwise a witness might be vexed and harassed exceedingly, by being obliged to neglect his business for two or three days or more. No such notice seems to have been given in this case. When the cause was called on, the attorney, not seeing him in court, and finding that he did not answer to his name, might have withdrawn his record, so that there was no absolute necessity to go to trial without him; instead of this, he chose to be nonsuited. As to his having no other witness, I should think there would always be some person in court who could prove a defendant's hand-writing. But, at all events, the mischief has arisen from his own act, in swearing the jury in the absence of a material witness; and though a man certainly is bound to attend during the whole sittings, if necessary, yet in this instance, he seems to have as-

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signed a reason sufficient to excuse him from any imputation of contempt.

The rest of the court concurred.

Rule discharged.

Monday,  
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NEWLAND v. MAJORIBANKS and others.

*A. devises "all the rest, residue, &c. of his estate of whatsoever nature or kind the same might be, and of which he might be possessed or interested in at the time of his decease, to trustees, to put and place out the same in some public or private funds, on good and sufficient security, with power to call in, remove, or new place out the same, and to receive the annual interest or produce thereof for ten years after his decease, in trust to place out the same annually in like manner, so that the interest might become a principal sum; and at the end of ten years to apply the annual interest of the whole of such principal money in the erection of a free school, to be under the management of the trustees, and their heirs; but the annual interest only to be so applied."—Held, that if the real estate passed at all under this will, it was, at all events, only for ten years.*

THIS was an action of trover, brought to recover the value of ten hogsheads of sugar; and was tried before Lord Chief Justice *Mansfield*, at *Guildhall*, at the sittings after last *Trin.* term, when a verdict was found for the plaintiffs with £ 300 damages, subject to the opinion of the court upon a case, of which the following is the substance:

*John Newland*, deceased, who at the time of making his will, and at his death, was seized in fee simple of a considerable real estate situated in *Jamaica*, and of personal property more than sufficient to pay his debts and funeral expences, on the 8th of *July* 1799, made his will, which was duly executed and attested to pass real estates in *Jamaica*, and thereby directed that all his debts and funeral expences should be paid, with the payment of which he charged all his estate, both real and personal; then followed some pecuniary legacies to be paid out of his personal property; immediately after which came the following clause: "As to all the rest, residue, and remainder of my estate, of whatsoever nature or kind the same may be, and of which I may be possessed or interested in at the time of my decease, I give,

at all events, only for ten years.

devise, and bequeath unto *Alexander Majoribanks* and others, their heirs and assigns for ever; nevertheless, upon trust, that they my said trustees do, as soon as conveniently may be after my decease, put and place out the same in some public or private funds, upon good and sufficient security, with full power at any time to call in, remove, or new place out the same, in such manner as they shall think fit, so as the best annual interest be made thereof; and to receive and take the annual interest or produce thereof, for and during *the term of ten years* after my decease, in trust to place out the same *annually* in like manner, so as that the interest may become a principal sum; and at the end of ten years, then that the trustees, their heirs and assigns, apply the annual interest of the whole of such principal money, in the erection of a free-school, in such part of the said parish of *Bullgate*(a) as they shall think fit, for the education of the youth of the said parish; such school to be under the management and direction of the trustees and their heirs, &c. but it is my will that the *annual interest* only be so applied."

The testator died on the 15th of *July* 1799, without altering his said will, and seized and possessed of his real and personal estate as aforesaid, leaving the plaintiff his nephew, and heir at law. The real estate continued in the care of the person who had managed it for the testator, for the benefit of whoever might be entitled to it, and this manager in 1812, sent the sugar, the subject of the present action, and being the growth of the year 1812, upon part of the said real estate, to *England*, to be delivered to the person entitled to it under the testator's will. There is no law in *Jamaica* prohibiting the devise of real estates to charitable uses. The defendants procured the sugar to be delivered to them, claiming as the

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(a) In *Scotland*.

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devisees mentioned in the will, and refused to deliver it to the plaintiff as heir at law to the testator.

The only question intended to be argued, was, which of them was intitled to the said sugar, according to the true construction of the will.

This case came on for argument on *Thursday*, the 18th of *November*, when Mr. Serjt. *Copley*, for the plaintiff, premised, that if the court decided either that the trustees took nothing of the real property under the devise, or that they only took an interest for ten years, the heir would be entitled to the proceeds of the sugar, they having arisen since the expiration of the ten years. And he relied on these two principles: first, That the heir at law was not to be disinherited, except by the express devise of the estate to another, or unless it appeared certainly by fair import, that it was the testator's intention so to devise them, and that in case of doubt, the heir should be preferred, and for this he cited Lord *Hardwicke's* judgment in *Timewell v. Perkins* (a); secondly, That in the construction of wills, the whole must be taken together, and

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(a) 2 At. 102. In that case, the words of the will were, "Item, all those my freehold lands and hop-grounds, with the messuages or tenements, barns, &c. now in the tenure and occupation of the widow *Leach*, and all other the rest, residue and remainder of my estate, consisting in ready money, plate, jewels, leases, judgments, mortgages, &c. or in any other thing whatsoever or wheresoever, I give unto *A. H.* and her assigns for ever." Lord *Hardwicke* held, that the word "estate," being expressly confined to personals, the real estate did not pass, and that, even though the word real had been added, the court would intend an intestacy in favour of the heir at law, unless there had been some words that shewed the intention to pass the real estate: and he laid it down as a general rule that "estate," where it is only coupled "with things that are personal, should be restrained to personals." See also *Dally v. King*, 1 H. B. 1. in which the court seemed inclined to think, that the words "estate of what kind soever," followed by the words "all other utensils of husbandry," and preceded by an enumeration of personal property, could not be intended by the testator to pass real property: but the court did not decide on this point. In *Shaw v. Bull*, 12 Mod. 592. the testator, after devising several estates to his wife, added, "and all the overplus of my estate to be at my wife's disposal, and I make her executrix." The court held, that only his personalty passed.

one part admitted to explain and modify another; on the authority of *Pitman v. Stevens* (a). On this last principle, he contended that it was the testator's intention to subject *no* part of the real estate to the uses of the trust; for though he admitted that the words in question, viz. *all the rest, residue, and remainder of my estate, of whatsoever nature or kind the same may be*, if they stood alone, would amount to a devise of the real property to the trustees, yet, coming just after the bequests of the *personal* property, they must be considered as referring to the personal property only. He contended further, that the words "*possessed or interested in*," referred to personal, rather than to real property; that, by directing the produce to be laid out *on good and sufficient security*, the testator must have meant the produce of the personal property, the real estate being sufficient security of itself; that, if he had meant to dispose of the real property, he would not have made use of the term "*annual interest*," but, "*rents and profits*;" and that, though the words "*heirs and assigns for ever*," might be said to have reference in general to real property; yet, as in a subsequent clause, he gave authority to the trustees, *their heirs and assigns*, to dispose of the whole of the principal money, without reference to real property, he might fairly be supposed to use the same words here, with relation to personal property only. On these grounds, he contended that the trustees took nothing of the real estate under the will; but, if the court should be of a different opinion on this point, at all events as the trustees had no power to sell the estate, the heir would be entitled to the beneficial interest in it, at the expiration of the ten years.

Mr. Serjt. *Pell*, *contra*, though he agreed in the general principles laid down by the other side, contended that

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(a) 15 East. 505; see Lord *Ellenborough's* judgment in that case.



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the trustees took an estate in fee. As to the case of *Timewell v. Perkins* above cited, the words there being "all the residue, &c. of my estate, consisting in ready money, &c." the words, estate, &c. were bound down and confined to the property specified. So in every case where the devise had been construed to relate to personal property only, there had always been some words which had bound down the general expression. In *Dor dem. of Burkitt and others v. Chapman (a)*, a devise of "all the rest and residue of my estate of what nature or kind soever," was held to include real as well as personal property, though accompanied with limitations peculiarly applicable, and usually applied, to personal property only. He said, it was apparent from the words of the will, that the testator meant to affect the real property some way; and as the school, which was the use to which the property was to be applied, was to be conducted according to the judgment of the trustees "and their heirs," he inferred that the estate in fee was meant to be transferred for the endowment. The only difficulty, he said, arose from the testator having given no express directions for the sale of the estate; but he contended, that the trustees might, if they thought proper, sell the estate; for the testator wishing to establish a school in *Scotland*, it must be supposed that he intended the estate in *Jamaica* to be sold for the endowment of it.

*Cur. adv. vult.*

On this day the Chief Justice delivered the opinion of the court.

This was a most absurd will, on which even the testator himself could not have put any reasonable construction. However, Mr. Justice *Heath* and myself, (who were the

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(a) 1 H. Bl. 223.

only judges present), are of opinion that the heir is intitled to the sugar, though we are not agreed on the medium by which he becomes so intitled. There is no doubt but the words "*of whatsoever nature or kind the same may be,*" of themselves, would comprehend the real estate as well as the personal. But, looking to the other parts of the will, I incline to think that the testator did not intend to pass his real property. Many cases have been cited, which only prove that in the construction of wills, one part must be taken to explain and modify the others; and in the construction of this will, I think it could only refer to the personal estate; because, whatever was in the testator's contemplation was to be "*placed out on good and sufficient security,*" which lands could not be; and the expression afterwards, of its "*becoming a principal sum,*" seems to apply so strictly to personal property only, that I think they control the general words. My brother *Heath*, however, thinks they are not controlled by the other parts of the will, but that the testator meant to give the real estate to the trustees, but only for ten years, and then that it should revert to the heir at law. If my idea be right, the heir took at the death of the testator; if that of my brother *Heath* be correct, he would take at the end of ten years: At all events, therefore, the sugars being the produce of the estate after the expiration of the ten years, the present plaintiff is entitled to recover.

*Postea* for the plaintiff.

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END OF MICHAELMAS TERM.

CASES  
ARGUED AND DETERMINED  
IN THE  
Court of Common Pleas.

IN  
HILARY TERM,  
IN THE  
FIFTY-FOURTH YEAR OF THE REIGN OF GEORGE III.

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*Memoranda.*

IN the last vacation, Mr. Serjt. *Shepherd*, the King's ancient serjeant, and Solicitor-General to his Royal Highness the Prince of *Wales*, was appointed Solicitor-General to the King, in the room of Mr. Justice *Dallas*, and was succeeded in the office of Solicitor-General to the Prince of *Wales*, by Mr. Serjt. *Best*.

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Lord Chief Justice *Mansfield* was absent the whole of this term from indisposition.

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Friday,  
Jan. 28.

BARWICK v. MATHEWS.

A copyholder having a right of common in two manors, and having received an allotment out of one, in lieu of his right in that manor, is entitled to his full allotment out of the other, when inclosed, whether the manors be held under the same, or under different lords. And though the estate, in respect of which he claims, be partly enfranchised freehold, that does not extinguish his right as to the part enfranchised.

THIS was an action to try a feigned issue under the authority of an act of parliament, passed for inclosing lands in the manor, lordship, or forest of *Westward*, in the county

of *Cumberland*, and was tried before Mr. Baron *Wood*, at the last assizes for that county. There were three issues: First, whether the plaintiff, as owner of lands in the parish of *Wigton*, were entitled, in respect thereof, to a right of common for himself and his tenants, occupiers thereof, or any part thereof, upon the commons of *Westward*; secondly, if he were so entitled, whether he were entitled, in respect thereof, to any allotment of the commons in *Westward*; thirdly, whether to a full allotment thereof. The plaintiff's estate, in respect of which he made this claim, was partly ancient, and partly enfranchised freehold, the latter having been formerly held in customary tenure of the Earl of *Egremont*, as parcel of the barony of *Wigton*, and by him enfranchised in 1778. In the deed of enfranchisement was this express clause: "And also all such common of pasture and turbary, in and upon all the commons and wastes of and within the said barony (of *Wigton*), as the said *Joseph Barwick*, at the time of the execution of these presents, is entitled unto, for and in respect of the said premises."—Lord *Egremont* was lord of both manors. An act for inclosing the commons in *Wigton* passed at the same time as that for inclosing *Westward*, and the plaintiff had received an allotment under the *Wigton* inclosure act, but it did not appear that he had received it as a full and acknowledged compensation for his claim in both manors. On the trial, it was proved that the plaintiff had exercised a right of common over *Westward*, for the space of thirty-five years; and Mr. Baron *Wood* left it to the jury to say, whether or no this user were sufficient evidence, from which to presume a regrant. A verdict was found for the plaintiff, the following points being reserved for the opinion of the court: first, Whether the plaintiff, having received an allotment under the *Wigton* inclosure act, was entitled to a full, or any allotment of common in

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*Wartwood*, being another manor under the same lord; and secondly, if so entitled, whether the deed of enfranchisement were not a bar to such claim.

The *Solicitor-General* moved last term that the verdict should be set aside, and a new trial granted on these grounds. As to the first point, he said, the case of *Hollinshead v. Walton* (a) had been alluded to at the trial, in which the court of *King's Bench* held that, where two manors were held of different lords, a tenant, having a right of common on both, was entitled to an allotment of each; but they were inclined to think that he would not have been so entitled, if the manors had been held under the same lord. [Lord Chief Justice *Mansfield*.—Why, if one of two manors be inclosed first, should not a man, having an estate in each, receive a share in the second, when that comes to be inclosed?] He then cited *F. N. B. tit. Admeasurement of Pasture*, 125, in which it is laid down that, "If the defendant have common appendant to his freehold, in three vills, it may be admeasured for 'the lands in one of the vills.'" As to the second question, he contended that, as the plaintiff could only claim his right of common as a copyholder, except as to that part which was freehold originally, and for which therefore he might prescribe, the right was destroyed, as to that part which had been enfranchised, and of which there had been no regrant in the deed of enfranchisement (b). The Chief Justice was of opinion, that there might be a question as to the last point, because he could not claim by prescription.

The rule  *nisi* was accordingly granted, and on this day Mr. Serje. *Rough* showed cause against it.—As to the first point, he said, the defendant relied on the distinction

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(a) 7 *East* 495.—(b) The clause containing the regrant, only related to *Wigton*.

which the court of *King's Bench*, in the case of *Hollinshead v. Walton*, seemed inclined to take between manors held under the same and under different lords; but he contended that there was no express authority to warrant such a distinction. The passage cited from *F. N. B.* proved nothing in the present case, as the tenant might very possibly be entitled to his writ of admeasurement of pasture, and yet have no claim to what was the subject of the present action, and *vice versa*. As to the second point, whether the enfranchisement were an extinguishment of the right, as to so much as was enfranchised; he said that, in *Crowder v. Oldfield* (a), it was decided that if a copyholder, who had common of pasture in the wastes of the lord, *out of* the manor, enfranchised his copyhold estate, still his common remained, because he made title through the lord; *aliter*, if he had common over the wastes *within* the manor, because that belonged to the estate. So in 1 *Rel. Ab. tit. Extinguishment*, pl. (A) 2. "If a copyholder of a manor have had immemorially a right of way over the land of another copyholder, and he purchase the inheritance of the copyhold, by which the copyhold is extinct, still the right of way is not extinguished by it." [Mr. Justice *Heath*.—That is another thing: The right of common is a profit *à prendre*; a right of way is a mere easement.] This, however, would go to strengthen the doctrine laid down in *Crowder v. Oldfield*, above cited. But if the enfranchisement should be held to have extinguished the right, still, he contended, there was enough in the user of thirty-five years, from which to presume a regrant. In *Cowlam v. Black* (b), in which the plaintiff claimed common appurtenant, and proved fifty years user as tenant to the lord of the manor, the defendant objected that the unity of possession extinguished the

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(a) 1 *Salk.* 170.—(b) 15 *East.* 108.

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common ; but the court of *King's Bench* held that common appurtenant might as well be by grant as by prescription, and that the user for fifty years was evidence for the jury to presume such a grant.

The *Solicitor-General* and Mr. Serjt. *Pell*, *contra*, admitted that where the tenant held in different manors, under different lords, his receiving an allotment out of one manor did not preclude him from claiming his share in the other, because one lord was in no way concerned with the grants which another might think proper to make: But where there was the same lord of two manors, when the commons came to be apportioned out for the satisfaction of the commoner's rights, he was interested in the allotments made, and common justice required that each tenant should receive no more than a full compensation for the loss of his right. The lord was not to make satisfaction twice over; the distinction, therefore, which the court of *King's Bench* inclined to make in *Hollinshead v. Walton*, was a just one. [Mr. Justice *Chambre*.—You are assuming that the manors had immemorially been held under the same lord, in which case the right could not have existed over both manors; there must, therefore, originally have been different lords.] The plaintiff claimed a right of common over *Westward*, on the strength of a user for thirty-five years, by which he pretended that a regrant was to be presumed; and as the deed of enfranchisement, which contained a new grant as to *Wigton*, was made in 1778, the two manors must have been under the same lord at the time of the supposed regrant. The lord, and, through him, his tenant, had a right to turn in so many cattle on the wastes in two manors; but his right was for the same cattle on both, that is, for the same quantity, and if he were satisfied for that quantity in one manor, he had no right to demand any more. [Mr. Justice *Chambre*.—Suppose he had re-

leased his right in one, would that have lessened his right over the other?] If there had been no enclosure acts, and the lord had chosen to approve so much as would have excluded the tenant from his right over *Westward*, leaving sufficient common for him on *Wigton*, he certainly would have had a right to have done so. *Bro. Ab. tit. Common of Pasture*, 52. "A man has common in three villis, the lord may approve in one vill, leaving sufficient common in the others;" *à fortiori* therefore, they contended that an act of parliament had power to do so.

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Mr. Justice HEATH.—I am of opinion that there is no ground for granting a new trial, on either of these objections; I see no reason why the allotment out of *Wigton* should be considered as a compensation for the allotment out of *Westward*, whether the manors be held under the same or under different lords. Originally they could not have been under the same lord. It appears too, from the act for inclosing *Wigton*, that no reference was had to the right claimed over *Westward*.

Mr. Justice CHAMBRE.—I am also of opinion that the present verdict should stand. The case cited from *Bro. Abr.* makes no difference. Certainly when there is more common than is necessary for the tenants, the lord may approve, but his approving in one manor would make no difference as to the other.

Mr. Justice DALLAS concurred.

Rule discharged.

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MUFFATT v. PARSONS.

Saturday,  
 Jan. 29.

THIS was an action for goods sold and delivered, to which the defendant pleaded a tender. On the trial of the cause, it appeared that, on the plaintiff's writing to  
 should have received orders

A tender to a managing clerk, before action brought, is good, though the clerk not to accept it.



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demand payment of the balance due to him, the defendant sent the amount in a draught, which the plaintiff refused; the defendant then sent it in cash three times to the plaintiff's house, but the person employed to make the tender was never able to see the plaintiff. On the last attempt, however, he found the plaintiff's managing clerk, to whom he tendered the money, and who refused it, by order, as he said, of the plaintiff, the business being in the hands of an attorney.

Lord Chief Justice MANSFIELD, who tried the cause, was of opinion that nothing less than a tender to the principal would discharge the defendant, and a verdict was accordingly found for the plaintiff, subject to the opinion of the court, on the question, whether the tender, as above stated, were sufficient.

Mr. Serjt. *Vaughan*, accordingly, in the last term, obtained a rule *nisi* to set aside the verdict, and enter a nonsuit; and on a subsequent day in that term, Mr. Serjt. *Best* shewed cause. He insisted that the tender must be made to the plaintiff himself, or his agent authorised for that purpose. In this case, though the person to whom the tender was made, was sometimes in the habit of receiving money for the plaintiff, yet, in this instance, his authority had been expressly countermanded by his principal. He said it had never been decided that a tender to a clerk was sufficient. [Lord Chief Justice *Mansfield*.—A tender to a *managing* clerk must be considered sufficient.] That is only where he has been authorised; here, on the contrary, there had been an express countermand; the clerk therefore had ceased to be an agent.

Mr. Serjt. *Vaughan*, *contra*.—If this verdict were permitted to stand, it would be sanctioning the greatest oppression and injustice. The plaintiff, after he had refused the draught, knowing it would immediately be

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turned into cash, kept out of the way himself, and ordered his clerk, if it should be tendered to him, not to receive it. The refusal by the clerk, was a refusal by the principal, it having been made by the direction of the latter; and so, coming within the doctrine laid down in *Jones v. Barkley* (a), dispensed with the necessity of going to the principal. The defendant could not in any way save himself by a tender, as he had been told it would not be accepted. In almost every case, the tender, he said, was made to a servant or clerk. The reason assigned for the refusal, was that the business was in the hands of an attorney, and the only question seemed to be, whether this were a sufficient excuse for refusing to receive the money. In *Briggs v. Calverley* (b), the defendant pleaded a tender before action brought; the plaintiff replied, that before the tender, he had employed an attorney to sue the defendant, and that a writ of *latitat* had been sued out against him by the attorney, but not till after the tender. On a general demurrer, Lord *Kenyon* said, "it was impossible to contend that the tender came too late, it having been made before the commencement of the suit; that it would be introducing a most dangerous distinction, to depart from that line, on account of any previous steps taken by a party in contemplation of an action." (c)

Lord Chief Justice MANSFIELD.—There is no doubt upon this point. The only question is, whether this be a tender to, and a refusal by, the principal; and though it were to be wished that this could be made a legal tender, I have some doubts about it.

Cur. adv. vult.

(a) *Doug.* 659.—(b) 8 *Ter. Rep.* 629.—(c) See also 1 *Williams's Saund.* 33, n. (2).

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On this day, Mr. Justice *Heath* delivered the opinion of the court, which was, that the tender to the clerk must be considered the same as if it had been made to the principal.

Rule absolute.

Saturday,
 Jan. 29.

RICHARDSON AND ANOTHER, EXECUTORS, v. ROBERTSON.

On a writ of error to reverse an outlawry, on the ground "that the outlaw, before and at the time of suing out the writ of exigent, and from thence until the time of pronouncing the outlawry, was in parts beyond the seas;" the plaintiff in error having proved the previous proceedings in the outlawry, and that the outlaw, at the time of suing out the exigent, was abroad, and died abroad, but without fixing the time of his death;—Held, that it was not necessary to prove the time when the judgment of outlawry was pronounced.

THIS was a writ of error, brought by the executors of *Thomas Blease*, to reverse the outlawry of the testator, who had been outlawed in his life-time at the suit of the present defendant. The error assigned was, "That the said *Thomas Blease*, before and at the time of awarding and issuing of the writ of *exigi facias*, upon which the said outlawry was pronounced, and from thence continuing afterwards until and at the time of pronouncing the said outlawry, was in parts beyond the seas, to wit, at *Jamaica*, in the *West Indies*." To this the defendant in error replied, "That by reason of any thing for error assigned, the outlawry in form aforesaid, pronounced against the said *Thomas Blease*, ought not to be reversed, annulled, or held for nothing; because the said *Thomas Blease*, at the time of awarding and issuing of the said writ of *exigi facias*, upon which the said outlawry was pronounced, or afterwards, until and at the time of pronouncing the said outlawry, was not in parts beyond the seas." On which replication issue was joined. At the trial at *Guildhall*, at the sittings after last *Michaelmas* term, the plaintiff in error proved the previous proceedings in the outlawry, but failed in establishing the time when the writ of proclamation issued. It was also proved, that the outlaw, at the time of suing out the exigent, was in *Jamaica*, and afterwards died; but the time of his death did not appear.

Mr. Serjt. *Lens*, for the defendant in error, objected that it was necessary to shew the time when the outlawry was pronounced.

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Lord Chief Justice MANSFIELD, however, who tried the cause, over-ruled the objection, considering that the time was immaterial, as it appeared on the evidence that the outlaw never returned from *Jamaica*, but died abroad. He however reserved the point, and on this day the *Solicitor-General*, in the absence of Mr. Serjt. *Lens* from indisposition, moved to set aside the verdict, and enter a nonsuit. He contended, that as the issue was, "that the outlaw, before and at the time of awarding and issuing the writ of exigent, and from thence continuing afterwards until and at the time of pronouncing the outlawry, was in parts beyond sea, &c." it was necessary to shew when the outlawry was pronounced, in order to make out the issue; he might have died between the time of suing out the exigent, and judgment of outlawry; in that case he could not have been said to have been "until and at the time of pronouncing the outlawry, in parts beyond sea."

But the court held, that the substance of the issue had been proved, and that there was no occasion to prove when the judgment was pronounced.

Rule refused.

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CROFTS v. JOHNSON.

Tuesday,  
 Feb. 1.

Mr. Serjt. *Pell*, on a former day in this term, obtained a rule *nisi* to set aside the judgment and execution had thereon, against the bail of *Abraham Jones*, on the ground accepted a *cognovit* from the defendant in the original action, the last instalment of which would become due on a day subsequent to that on which the plaintiff would have been entitled to judgment and execution, had he gone to trial in the original cause.

The court will set aside the proceedings against bail, on the ground of the plaintiff having

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that the plaintiff had accepted a *cognovit*, payable by instalments, from the defendant in the original action, and had thereby given time to the latter. The declaration was delivered as of *Easter* term, with notice to plead within the first four days of *Trinity* term. On the 16th of *June*, on which day the time for pleading expired, the defendant wrote to the plaintiff's attorney, offering a *cognovit* for the debt and costs, which offer the latter accepted, and accordingly sent a *cognovit* on the back of the declaration to the defendant's attorney. The defendant, however, neglected to sign it, and towards the close of *Trinity* term, the plaintiff's attorney received a plea of the general issue. It was then too late to get the necessary witnesses, so as to try at the sittings after *Trinity* term. On the 31st of *August*, the defendant in the original action executed the *cognovit* for the amount of the debt and costs, being £25 : 12s : 6d., payable by the following instalments, viz.: £10. on the last day of *September*, and the remainder in moieties, one on the last day of *October*, the other on the last day of *November*.

Mr. Serjt. *Marshall*, in shewing cause against the rule, contended, that in fact the payment was accelerated by the acceptance of the *cognovit*, since the greater part of the debt would have been recovered before the plaintiff could have entered up judgment in the original action. He cited *Hodgson v. Nugent (a)*, where the court of *King's Bench* held that a *cognovit* given by the principal, without notice of it to the bail, did not operate as a discharge of the latter.

The court were clearly of opinion that a *cognovit*, of itself, was no discharge to the bail, unless time were given by it to the principal; but as, in this case, it appeared

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(a) 5 Term Rep. 277.

that the cause might have been tried at the sittings in *Michaelmas* term, by which means the plaintiff would have been entitled to judgment and execution before the last day of *November*, on which day the last instalment of the *cognovit* would have become due, they considered that time *had* been given to the defendant in the original action, and that therefore the bail were discharged.

Rule absolute.

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DOE, ON THE DEMISE OF CHRISTOPHER PARKIN AND  
JAMES WILKINSON, v. JOSEPH PARKIN.

Thursday,  
Feb. 3.

THIS was an action of ejectment, brought on the several demises of *Christopher Parkin* and *James Wilkinson*, to recover possession of a messuage and five acres of land, called *Spring-house*, and of an inn called *the Tontine*, and nine acres of land, all situate in the township of *Thurgoland*, in the county of *York*. The cause was tried before *Mr. Baron Thomson*, at the last spring assizes for the county of *York*, when the jury found a verdict for the plaintiff, absolute as to *Spring-house*, but as to *the Tontine* inn, subject to the opinion of the court on the following case.

*Joseph Parkin*, by his will dated the 1st of *February*, 1800, devised all his messuages, tenements, closes, lands, grounds, hereditaments, and premises, situate in the township of *Thurgoland*, in the parish of *Silkstone*, and county of *York*, and then in his own occupation, to *James Wilkinson*, (one of the lessors of the plaintiff,) to hold to him, his

*A.* devised all his messuages, tenements, lands, &c. situate in *T.*, and then in his own occupation, to *B.* for five hundred years, upon certain trusts; after the determination of which term, and subject thereto, he devised all his said messuages, &c. so situate, to *C.*, and in case of *C.*'s death, he devised the said last mentioned hereditaments and premises over. He also bequeathed to *C.* the stock, crops, &c. which at his death should be upon his said estate and premises at *T.*, then

in his own occupation.—Held, that those premises only passed by the will, either to *B.* or *C.* which were in the testator's own occupation at the time of making his will.

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PARKIN.

executors, administrators, and assigns, from and immediately after his decease, for five hundred years, upon the trusts thereafter declared; and from and after the determination of the said term, and in the mean time subject thereto, he devised all and every his *said* messuages, &c. so situate in *Thurgoland* aforesaid, to his son *Christopher Parkin*, (the other lessor of the plaintiff,) his heirs and assigns, for ever; and in case of his death before he attained the age of twenty-one years without lawful issue, then he devised the said *last mentioned* hereditaments and premises unto and equally amongst the survivors and survivor of all his sons and daughters, to hold to them, their heirs and assigns, for ever. And he further bequeathed to his said son *Christopher*, all the cattle, stock, implements of husbandry, crops of corn, corn growing or in the straw, and all other his personal effects whatsoever, which should, at the time of his death, happen to be in, upon, about, or belonging to his said estate and premises at *Thurgoland* aforesaid, *then in his own occupation*. The defendant, *Joseph Parkin*, was the testator's eldest son. The testator, at the time of making this will, besides certain other premises in *Thurgoland*, which were in his own occupation, and into the possession of which *Christopher Parkin* entered on his father's death, was seised in fee of *Spring-house*, and of the *Tontine* inn: As to the former of which, the jury found an absolute verdict for the plaintiff, as having been in the occupation of the testator at the time of making his will: As to the *Tontine* inn, which was proved not to have been in his occupation at that time, they also found a verdict for the plaintiff, but subject to the opinion of the court, on the question, whether the plaintiff were entitled to it under the above will. If the court should be of that opinion, then a general verdict was to be entered for the whole of the premises for which the ejectment was brought; if otherwise, the verdict

was to be confined to the premises called *Spring-house*.

Mr. Serjt. *Copley*, for the lessors of the plaintiff, contended, either that all the premises belonging to the testator in *Thurgoland*, passed to *James Wilkinson* for the term of five hundred years, on the trusts mentioned in the will, or else that *Christopher Parkin* was entitled to them, under the subsequent devise to him. The argument on the other side, he said, would arise out of the words *then in his own occupation*, which the defendant would contend were restrictive of the general words, and descriptive of the premises to be conveyed. But he contended that there was no necessity for putting so strong a construction upon them. This was not to be construed as if it had been a devise of *such or such part* of the testator's messuages *as were in his own occupation*; there was no necessity to have inserted any particular description of the premises, but it having been added superfluously, did not, he contended, control the former general description. Suppose it had been a devise of all his property in *Thurgoland*, and he had afterwards added *his bouse in which he lived*, there would have been no inconsistency in that. In order to support the construction which the defendant would contend for, it would be necessary to change the word *messuages* to *messuage*, because the devise was of all the testator's *messuages*, in the plural number, and there was only one in *Thurgoland* actually in his occupation, at the time of making his will. The plaintiff's claim was supported by a decision, which had never been disputed, that of *Mirrell v. Nicholls* (a), in which the testator, being possessed of two several moieties

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(a) 1 *Buls.* 117.



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of lands, one in *Kent*, and the other in *Essex*, devised "all his *moieties* in *Kent*," without mentioning his moiety in *Essex*; and the court held that, under the word *moieties*, the latter passed as well as the former. That case, he said, was similar to the present, changing the word *moieties* into *messuages*, and had been recognised and confirmed by the judgment of the court of *King's Bench*, in the case of *St. John v. The bishop of Winchester* (a). There, the testator devised all his advowsons, &c. in the county of *H. for the purchase of which he had already contracted and agreed*; and the court of *King's Bench*, on a writ of error from the court of *Common Pleas*, held, that an advowson, the purchase of which had been *completely executed* before the making of the will, passed by this devise of *advowsons* in the plural number, notwithstanding the restrictive clause; and accordingly reversed the judgment of the *Common Pleas*, which had decided that it did not pass: And on a writ of error brought in the *House of Lords*, the judgment of the *King's Bench* was affirmed (b). [Mr. Justice *Heath*.—The decision in the *House of Lords* is of no great authority, according to the report of the case in *Blackstone* (c), for that states that it was in agitation to move for a re-hearing of the cause, on the ground of that decision having been against the general sense of the house.] He then cited the case of *Boocher v. Samford* (d), where the testator devised "the tenement with the appurtenances, in which *H. B. dwelleth in Ebley*," and the court held that this devise was not confined to the house in which *H. B. dwelt*, but that all the lands which were used with the house passed, though not in *Ebley*. [Mr.

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(a) 1 Cowp. 94.—(b) 3 Brown's Parl. cases, 375. 2d edit.—

(c) 2 Bl. Rep. 930.—(d) Cro. Eliz. 113.

Justice *Henth.*—But in that case, the lands passed under the word *appurtenances*.] But if the court should be against the plaintiff on this point, he contended that the whole property in question passed under the devise to *Christopher Parkin*. The defendant would argue against this position, on the ground that the word *said* limited this devise to such tenements as were in the testator's occupation: But that word did not necessarily adopt the restriction, if any there were, imposed by the clause, *then in his own occupation*; and a subsequent clause of the will proved, he said, that such was not the intention of the testator; for by that clause, in case of *Christopher's* death, he gave the *last-mentioned* premises amongst his sons and daughters; if the premises in both clauses had been the same, he would not have made use of the expression *last-mentioned* premises.

Mr. Serjt. *Vaughan*, *contra*, observed, that there was a circumstance in the will which had not been adverted to; viz. That where the testator bequeathed the stock and implements of husbandry to *Christopher*, he also gave him the *crops* which should be on the premises at the testator's death; this he could not have done, of premises which were not in his own occupation.

He was here stopped by the court, who were clearly of opinion that the testator only meant to affect those premises which were in his own occupation, at the time of making his will. The verdict was accordingly confined to the premises called *Spring-house*.

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HILTON v. HOPWOOD.

Thursday,  
Feb. 3.

On a motion for an attachment for filing a bill in equity, contrary to an order of reference, an affidavit that notice of the motion to make the order a rule of court had been served on the party's servant, &c. is not sufficient.—If the day for making the award have elapsed without any award made, the court will not grant an attachment for disobedience to the order, unless notice of the enlargement of the time have been served upon him.

MR. Serjt. *Shepherd* and Mr. Serjt. *Best*, on *Friday*, the 26th of *November*, in last *Michaelmas* term, obtained a rule *nisi* for an attachment against the defendant and his attorney, in this action, for filing a bill in equity, contrary to a rule of the court. The cause, which came on for trial on the 5th of *November*, at the sittings before *Michaelmas* term at *Guildhall*, was referred to an arbitrator, to ascertain the value of the goods, for the recovery of which the action was brought. The rule of reference contained the usual clause, "that neither of the said parties should bring or prosecute, or cause to be brought or prosecuted, any writ of error, or any suit in equity, against the said arbitrator, or against each other." The defendant, however, had on the 19th of *November* following filed a bill in the court of *Exchequer*, for an injunction to restrain the plaintiff from proceeding any further in the cause. The plaintiff's attorney had served a notice of the motion to make the rule of reference a rule of court, on the defendant's servant, and on the aunt of his attorney, on the 24th of *November*, on which day the order of *nisi prius* was made a rule of the court.

Mr. Serjt. *Vaughan*, on *Monday*, the 29th of *November*, in the same term, shewed cause against the rule, and contended that to make a person liable to an attachment, there should have been an affidavit of personal service of the rule, for disobedience to which he was to be brought into contempt. In this case, he said, the bill in equity had been filed, before the order of reference had been made a rule of court; so that the rule, for disobedience to which the attachment was moved for, was not in existence when the supposed contempt was committed.

Mr. Serjt. *Shepherd*, and Mr. Serjt. *Best*, *contra*, insisted that the rule which was to bring the party into contempt

had been served. They admitted that the order of reference must be made a rule of court, but they contended that, when it was so made, it related back to the time of making the original order of *nisi prius*. If it could be objected that the bill in equity had been filed before the order was made a rule of court, no rule of reference, nor any other order of *nisi prius*, could bind a party from filing his bill in equity. Suppose an order of reference were made at the sittings after *Trinity* term, or an order that the matters in question should remain in *statu quo*, this could not be made a rule of court till *Michaelmas* term; and during any part of the vacation, a bill in equity might be filed, and the party violating the rule could not be attached. They distinguished this from the case of an *allocatur*, because there it was necessary that there should be an actual demand of payment.

Lord Chief Justice MANSFIELD.—It is true that the rule of court relates back to the order of *nisi prius*, but this was not a rule of court when the supposed offence was committed, nor has it been personally served.

The rule was accordingly discharged.

On the 2d of *December* following, the rule of reference, having been made a rule of court on the 24th of *November*, was personally served on the defendant and his attorney, notwithstanding which service, on the 18th of *December*, they took a further step in the suit in equity, and the *Solicitor-General* and Mr. Serjt. *Best*, on a former day in this term, obtained another rule *nisi*, for an attachment against the same parties.

On this day, Mr. Serjt. *Vaughan*, in shewing cause, contended that as the award was to have been made on or before the 1st of *December*, which day had elapsed without any award having been made, or any notice given to the defendant of the time having been enlarged, the

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arbitrator's jurisdiction was at an end, and the defendant, therefore, could not be brought into contempt, for any act done by him subsequently to that time.

The *Solicitor-General* and Mr. Serjt. *Best*, *contrò*, contended that, as the only defect in the application against these parties last term was that there had been no service of the rule of court, and as now the order of reference had been made a rule of court, and had been personally served on the defendant, the latter had, by taking a fresh step in the suit in equity, committed an act of disobedience to a rule of court which was still binding on him; for they contended that there was no necessity to give notice of enlargement of the time for making the award.

Mr. Justice *HEATH*.—Is it not usual to give notice of the time having been enlarged? How can a party be guilty of a contempt, unless he have received such notice? The defendant, in this case, has done wrong, in filing and prosecuting the bill, but I doubt whether he has been guilty of such a contempt as would warrant the court in granting an attachment against him.

The rest of the court concurring with Mr. Justice *Heath*, it was agreed that the arbitration should go on, and the bill in equity be dismissed.

Friday, Feb. 4.

JAYNE v. PRICE.

In a writ of right, forty-years undisturbed possession is sufficient to rebut presumptive evidence of a seisin in fee in the person under whom the demandant claims; or, at least, from which to presume a conveyance of the premises to the tenant.

THIS was a writ of right, brought for the recovery of certain premises, situated in the parish of *Almondsbury*, in the county of *Gloucester*, and was tried before Mr. Justice *Bayley*, at the last summer assizes for that county. The demandant, *William Jayne* the younger, claimed in right of his grandmother, *Ann Jayne*, through his father *William Jayne*, who was son and heir to *Ann*; he proved that *Ann Jayne* had been in possession of the estates, and had received the rents of them till her death, which

happened in 1771: It did not appear that her son, *William Jayne* the elder, had ever been in possession; her daughter, the tenant's mother, having had undisturbed enjoyment of the property for forty years, viz. from the time when *Ann Jayne* died, till her own death, which took place in 1811; and her brother, the demandant's father, having received the rents for her.—The learned judge left it to the jury to say, whether, supposing *Ann Jayne* to have been seised in fee, there were not sufficient ground to presume that the property had been disposed of by will or otherwise; observing that it was a singular circumstance, if the demandant's father had any claim to the estate, that he should have suffered his sister to remain in quiet possession of it for forty years, and should even have received the rents for her. The jury accordingly found a verdict for the tenant. In *Michaelmas* term last, Mr. Serjt. *Shepherd* moved for a new trial, on the ground of misdirection of the judge; and on this day, Mr. Serjt. *Vaughan* was to have shewn cause against the rule, but was stopped by the court.

The *Solicitor-General*, in support of the rule, contended that the demandant, having given *prima facie* evidence of a seisin in fee in *Ann Jayne*, by shewing that she had been in the habit of receiving the profits, was entitled to a verdict, unless the tenant could have shewn some deed or conveyance on which to rest his claim; if possession for forty or fifty years could be set up as an answer to a writ of right, he said, there would be an end of the remedy; the intent of which was to step in, when by lapse of time the party had been defeated of his other actions.

Mr. Justice HEATH.—Presumptions are to be repelled by facts, and by contrary presumptions. In this case it is perfectly clear, that the *prima facie* evidence offered by the demandant has been rebutted by facts.

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Mr. Justice CHAMBER.—Surely forty years undisturbed possession, under the very eye of the person through whom the demandant claims, is sufficient to rebut the presumptive evidence offered by him: According to the doctrine which the demandant contends for, if I had been in possession for forty years, and another person could prove previous possession for five, I should be liable to be turned out. This would be giving to writs of right a most mischievous tendency.

Mr. Justice DALLAS concurring,

Rule discharged (a).

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(a) See *Goodtitle d. Parker v. Baldwin*, 11 East. 488, where the court held that a possession of crown land for fifty-five years, obtained by encroachment on the crown, was sufficient evidence from which to presume a grant from the crown, if the crown were capable of making such a grant.

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Saturday, Feb. 5.

PRINCE V. NICHOLSON.

A plea *puis darrein continuance* may be pleaded at any time after the last continuance, either in *bank*, or at *nisi prius*, and it is imperative on the judge at *nisi prius* to receive it. The plaintiff cannot object, at *nisi prius*, that the plea is such a one as ought not to be received. An affidavit, which is annexed to a plea, refers to the plea, and therefore needs not be entitled of the cause: If, however, on the objection being made, the defendant entitle it, that is not such an alteration as to make a new stamp necessary.

THIS was an action against the executor of the will of T. C. Nicholson, for goods sold and delivered to the testator. The defendant, in *Trin.* term last, pleaded *non assumpsit*, and the cause was set down for trial for *Wednesday*, the 24th of *November*, in *Michaelmas* term, at *Guildhall*. On the *Saturday* preceding, viz. the 20th of *November*, the defendant filed a plea *puis darrein continuance* of a judgment recovered against him as executor, in a plea of debt, for money borrowed by the testator in his lifetime. This plea, as it appeared, was informal, in not having a *serjeant's* name to it; at *nisi prius*, therefore, the defendant tendered a plea properly signed, which Lord

Chief Justice *Mansfield*, conceiving, on the authority of *Moore v. Hawkins* (a), that it was discretionary in him to receive it, refused; and the jury found a verdict for the plaintiff. It was also objected, as to the plea tendered at  *nisi prius*, that the affidavit to verify it was not entitled of the cause; upon which the defendant inserted the name of the cause, and then filed and reswore it.

Mr. Serjt. *Best*, in the same term, obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial granted, and the plea be received as a good and sufficient plea.

The *Solicitor-General*, on *Friday*, the 4th of *February*, in this term, shewed cause, and contended, 1st. That though a defendant had a right to produce his plea at  *nisi prius*, where his defence had arisen just before the trial, yet he could not do so after he had had an opportunity of filing it in *bank*. [Mr. Justice *Heath*.—He had done so, but the plea so filed was a nullity.] At all events, it was discretionary in the judge to receive it: *idly*. But supposing the defendant had a right to offer it, another question, he said, arose as to the affidavit, which, he contended, it was necessary should be entitled of the cause, because it was a separate paper, in like manner as the affidavit which accompanies a plea in abatement (b). [Mr. Justice *Heath*.—Suppose the case of a letter annexed to the plea and sworn to. Here there is a reference to the plea in the affidavit, and therefore the name of the cause is disclosed.] The affidavit to set aside an attachment against the sheriff, he said, referred to the matter in question, yet that must be entitled; though, perhaps, that would not be necessary, if it were on the same paper. The objection, however, being made, the defendant enti-

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(a) *Yelo*. 180. cited in *Bull. N. P.* 309.—(b) Required by 4 and 5 *Ann. c.* 16. s. 11.



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ted it, and then filed and reswore it. An affidavit once used and filed, he contended, could not be altered without being restamped. The old stamp being *functus officio* by the statute 1 Ann.(a), there was an end of the instrument after such user, or rather such an attempt to use it; the plea, therefore, was not verified by affidavit, for the affidavit was a nullity. In *Calvert v. Roberts*(b), Lord *Ellenborough* held, that a bill of exchange could not be altered after acceptance and an attempt to negotiate it, though with the consent of the parties to it, and though it were an accommodation bill. [Mr. Justice *Dalles*.— But there is another case in *Campbell* where it was differently held (c)]. 3dly. Then came the question, whether the plea were such a one as ought to have been received. Before an executor could set up a judgment recovered as a defence, he must prove it to be such a judgment as he is bound to pay. The judgment in the present case was on a *mutuatus*, which he might reverse on a writ of error, according to the case of *Barry v. Robinson* (d), which was an action of debt on a promissory note against an administrator: to this there was a general demurrer, and the defendant had judgment. On the authority of this case, therefore, the defendant had it in his power to reverse the judgment, and was even bound not to pay it. This, he said, was not merely a demurrable objection; it was such a one as made the plea a nullity.

The court called on Mr. Serjt. *Best* and Mr. Serjt. *Copley* to answer the last objection;—as to which, they said, the rule was, that where the plea *puis darrein continuance* was tendered at the assizes, it was to be received

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(a) *St. 2. c. 22. s. 2.*—(b) 6 *Camp.* 343.—(c) It is presumed that the learned judge alluded to the case of *Cordwell v. Martin*, 1 *Camp.* 79, in which Lord *Ellenborough* took a distinction where the alteration is made before the instrument gets abroad into the world. See also *Marson v. Petit*, there cited.—(d) 1 *New Rep.* 393.

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at the assizes, and was parcel of the record; and the plaintiff could not demur or object then, but must apply to the court afterwards. If the plea in itself were not available, it was no answer to the action, and the plaintiff might object to it on the return of the record in *bank*. As to the affidavit, there was no occasion to entitle it at all, because the plea was entitled, and the affidavit referring to the plea, it was evident that it was a proceeding in the cause: But when it was entitled, they contended, there was no necessity for a new stamp; because, when the objection was made that it was not entitled, the affidavit was not *functus officio*, but was still in progression, for it never had been filed, but was yet in the officer's hands. [Mr. Justice *Dallas*.—Besides, it refers to the plea, and is to be taken conjointly with it]. As to the first of the *Solicitor-General's* objections, they said, the last continuance was the return of the *venire*, and the defendant might plead any thing between that and the next continuance, either in *bank*, or at *nisi prius*. They cited *Coke's Entries*, 517; 2 *Vent.* 58; and *Bro. Ab. tit. Continuance*, pl. 2. from all which authorities, the principle to be collected, they said, was that the defendant might always plead *puis darrein continuance*, either at *nisi prius* or in *bank*. The plaintiff contended at the trial that the first plea, not having been signed, was a mere nullity; the defendant, therefore, had a right to treat it as a nullity also. Lord Chief Justice *Mansfield* had rejected the plea on the authority of an old case in *Yelverton* (a); but in a more modern case of *Paris v. Salkeld* (b), the court of *Common Pleas* held that it was not in their power to reject a plea *puis darrein continuance*, if verified by affidavit; and in *Lovel v. Eastaff* (c), Lord *Kenyon* recognized and

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(a) 180. Vide *suprà*.—(b) 2 *Wils.* 137.—(c) 3 *Term Rep.* 554.

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confirmed that judgment. If this plea were not to be received, whether good or otherwise, the defendant could have no remedy, since an *audita querela* would give no redress, where the plea might have been pleaded in any stage of the cause; and the plaintiff would have an opportunity of setting aside the judgment, if it should appear that the defence was fraudulent.

On this day, Mr. Justice *Heath* delivered the opinion of the court, which was in favour of the defendant on each of the objections which had been made. As to the affidavit, he said, there was no occasion to entitle it at all; the court had directed generally that every affidavit should be entitled of the cause, in order that it might be identified, particularly in cases where it might be necessary to bring an action or indict for perjury; but that made no difficulty in the present case, because the affidavit was annexed to the plea, and referred, therefore, to the title of the plea, as if it had been incorporated with it.

Rule absolute.

Saturday,  
Feb. 5.

WILSON v. AMES.

The plaintiff in replevin may plead in bar to the defendant's avowry or cognizance, that he did not hold as tenant, with a plea of infancy.

MR. Serjt. *Onslow* shewed cause against a rule obtained by the *Solicitor-General* in this cause, which was an action of replevin, for leave for the plaintiff to plead several matters in bar to the defendant's cognizance: viz. first, That he did not hold as tenant; secondly, no rent in arrear; thirdly, infancy.—He said he had never known infancy pleaded with *non-assumpsit*; and therefore, he contended, it could not be pleaded with a denial of the tenancy.

The *Solicitor-General*, *contra*, said it was never necessary to plead infancy with *non-assumpsit*, but *non est factum* and infancy were often pleaded together.

The court said, they frequently allowed pleas of this kind to be joined, and the rule was accordingly made absolute (a).

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(a) See *Tidd's Practice*, p. 671. fifth edit.

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THE KING v. THE SHERIFF OF SURRY, in a cause of  
CAFFALL v. HUNTLEY.

Monday,  
Feb. 7.

THE plaintiff, *Caffall*, had sued out a writ of *capias* against *FREDERICK Huntley*, indorsed for £19: 15s., by virtue of which the sheriff arrested the defendant, who was pointed out to him by the plaintiff, by the name of *FREDERICK Huntley*, and kept him in custody until he entered into a bail-bond, which he did by the name of *FRANCIS Huntley*; *Francis* being his real christian name. The sheriff, being ruled to return the writ, returned, "I have taken *Francis Huntley*, sued by the within name of *Frederick Huntley*, whose body I have ready." Bail above not having been put in and perfected by the defendant, an attachment issued against the sheriff for not bringing in the body.

Where a defendant has been arrested by a wrong christian name, and the sheriff returns, "I have taken *A. B.* sued by the name of *C. B.*," the sheriff is a trespasser; and the court will set aside an attachment issued against him for not bringing in the body.

Mr. Serjt. *Best*, on a former day, obtained a rule *nisi* to set aside this attachment, and Mr. Serjt. *Blissett* now shewed cause against it. He said, this was the case of a right person sued by a wrong name; and he contended that, though the defendant might have pleaded in abatement, the sheriff could not, after having returned "*capi corpus*," move to set aside the attachment on this ground:

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At all events, he should have moved to set aside the writ.

Mr. Serjt. *Best*, *contra*, contended, on the authority of *Wilks v. Lerck* (a), that the sheriff had no right to detain the defendant a single moment; and that it never could be maintained, that the sheriff was to keep a man in custody, who had been arrested by a wrong name, in order that the plaintiff might declare against him.

*Per Curiam*.:—The sheriff was evidently a trespasser; for it appears on the face of the return, that the defendant was sued by a wrong name.

The rule must therefore be made absolute.

(a) 2 *Tawn*. 399. In that case, the defendant had been arrested by a wrong christian name; the court, on motion, discharged him out of custody, and Mr. Justice *Lawrence* said, the sheriff was liable to an action of false imprisonment, for having so arrested him.

Wednesday,  
Feb. 9.

MESTAER, and another, assignees of LAWRENCE WILLIAMS,  
a bankrupt, v. ATKINS and another.

*A.* commissions  
*B.* to sell a ship  
for him, and  
having deposited  
her register with  
him for that pur-  
pose, becomes  
bankrupt:—Held  
that *B.* has a lien  
on the register  
against the assign-  
ees of *A.* for the  
amount of his demand against *A.*, consisting partly of charges incurred on the ship's account, and partly of other charges; and that this was not such a transfer of the property, as to bring the case within the meaning of the register acts. But the ship, when put up to sale, having been bought in; held that *B.* is not entitled to a commission on the sale of her.

THIS action was brought to recover the sum of £400 : 6s: 6d, for money had and received by the defendants to the use of the plaintiffs, as assignees of *Lawrence Williams*, a bankrupt: The defendant pleaded the general issue, paid £21. into court, and gave notice of set-off as to the remainder of the sum claimed by the plaintiffs.

The facts of the case were these.—*Williams*, previously to

his bankruptcy, had commissioned the defendants to sell a ship for him, called the *Morning Star*, had given them a power of attorney to that effect, and deposited her register with them, for the purpose of facilitating the sale. The defendants were unable to dispose of her on the terms limited by *Williams*, and while she yet remained in their hands for sale, the commission issued. The plaintiffs, as assignees, in order to dispose of the ship with the other effects belonging to the bankrupt, applied to the defendants for her register, which they refused to deliver up, without first receiving the amount of their demand on the bankrupt, consisting of charges for goods furnished to him, for premiums of insurance, for the expences of putting the ship up to sale, and for a commission on the sale of her. The plaintiffs, not being able to complete the sale of the ship without having possession of the register, at length directed the brokers, who were employed by them to sell her, to pay the defendants their demand, and then brought this action for the amount. At the trial of the cause at *Guildhall* at the sittings after last *Trin.* term, Mr. Justice *Gibbs*, who tried the cause, being doubtful whether the defendants had any lien on the register, directed a verdict for the plaintiffs, with liberty to the defendants to move to set it aside, if the court should be of opinion that they were entitled to retain the register; or else to reduce the verdict to £19, in case the court, being in favour of the defendants on the subject of the lien, should think the charge made by them for commission on the sale of the ship, which, in fact, never was sold by them, could not be supported.

Mr. Serjt. *Vaughan* accordingly, in *Michaelmas* term, obtained a rule *nisi* on this ground. He said there was nothing in the register acts, which distinguished this from the common case of lien. The assignees, he contended,

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*b.*  
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stood in the bankrupt's place, and could not take the vessel out of the hands of the defendants, without first paying the demand which the defendants had upon the bankrupt's estate.

Mr. Serjt. *Best* now shewed cause. It would be impossible, he said, for the defendant to support his claim to a lien on the register, without running directly in the teeth of the register acts(*a*). He relied on the authority of *Hibbert v. Rolleston* (*b*), where the bankrupt, before his bankruptcy, had executed a bill of sale of the ship to the plaintiffs, which, with other documents, was to remain with them as a collateral security for the payment of a promissory note; but there having been no recital of the registry in the bill of sale, pursuant to stat. 26 *Geo.* 3., the court of *Chancery* held that the deficiency could not be supplied, and refused to compel a transfer of the money produced by the sale of the ship.—[Mr. Justice *Henth.*—But that was a transfer of the ship herself.]—He contended that it would be as much against the spirit of the act, to suffer a lien on the documents of a ship, as on the ship herself. The muniments by which the property was

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(*a*) Stat. 26 *Geo.* 3. c. 60. s. 17, enacts, "That when and so often as the property in any ship or vessel, belonging to any of his Majesty's subjects, shall be transferred to any other or others of his Majesty's subjects, in whole or in part, the certificate of the registry of such ship or vessel shall be truly and accurately recited, in words at length, in the bill or other instrument of sale thereof; and that, otherwise, such bill of sale shall be utterly null and void, as all intents and purposes." Stat. 34 *Geo.* 3. c. 68. s. 14, after reciting the above clause of 26 *Geo.* 3, and "that doubts have arisen, whether by the said provision every transfer of property in any ship or vessel is required to be made by some bill, or other instrument in writing, and whether contracts or agreements for the transfer of such property may not be made without any instrument in writing;" enacts, "that no transfer, or contract, or agreement for transfer, of property in any ship or vessel, made, or intended to be made, shall be valid or effectual for any purpose whatsoever, either in law or in equity, unless such transfer, or contract, or agreement for transfer, of property in such ship or vessel shall be made by bill of sale or instrument in writing, containing such recital as is prescribed by 26 *Geo.* 3." — (*b*) 3 *Brown's Rep.* 571.

secured, protected, or conveyed, came as fully within the meaning of the statutes as the property itself; if, therefore, the latter could not be transferred, unless the transfer were attended by certain formalities, neither could the former be conveyed without the same formalities: Indeed the possession of a ship's papers, he said, was the same thing in effect, as possession of the ship herself, since she could not go to sea without them; and the holder of them, therefore, had the same power over the ship, as if he actually had the ship herself in his possession. He cited *Curtis v. Perry* (a), and *ex parte Yallop* (b), in which cases Lord Eldon decided, "that a ship was to be considered as the property of that person only in whose name she was registered;" and he concluded that it would completely defeat the purposes of the acts, if the simple deposit of the register were to give any property, either in the ship or in the register.

The court, however, were of opinion, that the cases which had been cited were not applicable to the present; because, in them, the transfer had been of the ship herself, and it ought, therefore, to have been such a transfer as is required by the statutes; in this case, they considered that there was no ground to dispute the defendant's claim to a lien; but being clearly of opinion that they could not support their charge for commission on the sale of the ship, which had been bought in when put up to sale by them, they directed the verdict to be reduced to £19.

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MESTER  
and another,  
assignees, &c.

v.  
ATKINS  
and another.

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(a) 6 Ves. Jun. 739.—(b) 15 Ves. Jun. 60.



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Thursday,  
Feb. 10.

## GAMMON v. SCHMOLL.

Where a bill of exchange is accepted payable at a particular place, a presentment at that place must be averred in the declaration.

THIS was an action by the indorsee of a bill of exchange against the acceptor; and the first count of the declaration stated, that one *I. F. G.* on the 10th of *May*, 1813, at *London*, &c. according to the usage and custom of merchants, drew a certain bill of exchange, in writing, and directed it to the defendant, by the name and addition of *Mr. C. F. Schmoll, Henrietta-street, Bath*, and thereby required him, three months after date, to pay to the order of him the said *I. F. G.* £50. value received; which bill of exchange the defendant, on the day and year aforesaid, at *London*, &c. accepted, according to the said usage, "*payable at Batson's, London*;" that the said *I. F. G.* indorsed it to the plaintiff, by means of which the defendant, then and there, became liable to pay to the plaintiff the sum of money specified in the said bill, according to the tenor and effect of the said bill, and of his said acceptance thereof, and of the said indorsement thereon; and being so liable, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at *London*, &c. aforesaid, undertook and faithfully promised the plaintiff to pay him the said sum of money specified in the said bill, according to the tenor and effect of the said bill, and of his said acceptance thereof, and of the said indorsement thereon. To this the defendant demurred, and shewed for cause, "that, although it was alleged in this count, that the bill was accepted by the defendant, payable *at Batson's, London*; yet it did not appear in the said count, that the said bill was duly presented at *Batson's, London*, for payment thereof, according to the tenor and effect of the said acceptance; but for any thing appearing to the con-

trary, it might have been presented at any other place; and that the said declaration did not contain any averment of a due presentment for payment of the said bill, according to the tenor and effect of the said bill, and of the said acceptance." The plaintiff joined in demurrer, and on this day it came on for argument.

Mr. Serjt. *Vaughan* argued in support of the demurrer, on three grounds: first, On general principles; secondly, on general convenience; and thirdly, on the authority of decided cases.

*First*, On general principles:—He contended that as the acceptor appeared by the direction on the bill to be residing at *Bath*, this circumstance distinguished this from the other cases. The bill being so addressed, the acceptor writes on it "*payable at Batson's, London*:" Then the contract into which he had entered was, that he would not accept it generally, but only on condition that the holder would present it, when due, at *Batson's* coffee-house, in *London*. This, he said, was a condition precedent; and if a man took an acceptance with such a condition, he must prove that he had complied with it, before he could call on the acceptor to pay the bill; and it mattered not whether this agreement were made before it passed into the plaintiff's hands, or after.

*Secondly*, On the ground of general convenience:—He argued that if the plaintiff were to recover on this declaration, an acceptor, though his contract were that the bill should be paid where the acceptance made it payable, might be arrested a hundred miles from the place of payment, without any previous presentment at that place.

*Thirdly*, On the authority of cases:—He premised that in most of those which were against his argument, there appeared to have been a distinction made between promissory notes and bills of exchange; but in the case of

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Heylin v. Adamson (a), Lord Mansfield decided that when a promissory note was indorsed, the indorser became the same as the drawer of a bill of exchange, and the maker of it the same as the acceptor of a bill, and the indorsee of the former as the payee of the latter; and that all laws relating to bills of exchange referred equally to promissory notes, and *vice versa*. He said these were a great many authorities, both ancient and modern, in favour of the defendant. 1 *Roll's Abridg.* 444. pl. 2. "If the condition of a bond be to pay £10 on such a day at S. the obligor is not bound to pay in any other place." He cited this passage from Mr. Justice Bayley's treatise on bills (b): "In an action against the maker of a note, or the acceptor of a bill, *except on an acceptance at the house of a stranger*, the presentment is never stated." In *Parker v. Gordon* (c), which was an action against the drawer of a bill payable at Davison's and Co., the court of King's Bench held it was necessary to present the bill within the usual banking-hours; and Lord Ellenborough said, "If a party chuse to take an acceptance payable at an appointed place, it is to be presumed that he will inform himself of the proper time for receiving payment, and he must apply accordingly." His Lordship, therefore, necessarily inferred, that the bill was to be presented at the house; and this, he said, was very strong authority, because the learned Judge evidently considered it as a *restriction* of the undertaking, rather than an *expansion*, as he did in a subsequent case of *Fenton v. Goundry* (d), in which his Lordship held, that the acceptance, "*payable at Sykes and Co.*" was but an extension of the place where a demand might be made,—a notice to the holder that he *might* de-

(a) 2 Burr. 609. — (b) Page 185, 3d edit. — (c) 7 East, 385.
 (d) 13 East, 459.

mand payment there; but still imposing a general obligation on the acceptor, to pay the bill wherever demanded of him. In the course of the argument in *Fenton v. Goundry*, the case of *Bishop v. Chitty (a)* was cited, where the acceptance was, "Messrs. C. and M. pay this bill, when due, for T. Chitty." C. and M. were the acceptor's bankers, and no demand having been made from them, the court held that the plaintiff could not recover. Lord *Ellenborough* said, that "*Bishop v. Chitty* was merely the case of a draft on a banker, which the plaintiff must be considered as having taken in discharge of his debt." But he contended, that every bill payable at a banker's was, in effect, a draft on that banker, and that the distinction between the two instruments was merely a verbal one. This case, however, he admitted, was against the defendant, but it was very inconsistent with the decision in *Parker v. Gordon*, and had not, he observed, the sanction of one learned judge who was present when the latter case was argued (b).—In *Saunderson v. Bowes (c)*, which was an action against the makers of a note promising to pay "at the banking-house at *Workington*," the court of *King's Bench* held, that it was necessary to aver presentment at the banking-house: and in an action against the same defendants, on a note of the same tenor, the court of *Exchequer Chamber*, on a writ of error brought, gave the same judgment (d). Lord *Ellenborough* considered this case as materially different from that of *Fenton v. Goundry*, because, in the latter, the acceptance payable at a particular place was no part of the original conformation of the bill; in the case of *Saunderson v. Bowes*, the restrictive words were incor-

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(a) 2 Str. 1195.—(b) Mr. Justice *Le Blanc*.—(c) 14 East, 500.—(d) *Bowes v. Howe*, in error. 5 Taun. 30.

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porated in the original form of the instrument, which, his Lordship considered, alone created the contract and duty of the party. This doctrine might be correct, if the bill were a perfect instrument before acceptance, but he contended that it was not perfected till accepted; he admitted that the drawer drew the bill in confidence that it would be accepted, and that the payee might take it in the same confidence: and that if the acceptor refused to accept it generally, when presented for acceptance, the payee might immediately sue the drawer; but if he *did* take it accepted with such a condition, how could he refuse to comply with that condition? Why was the condition to be introduced at all, unless to constitute a condition precedent? In the case of *Saunderson v. Bowes*, Lord *Ellenborough* said, "the money is made payable at a specific place; a demand, therefore, at that place, by the holder, was a condition precedent:" And it was impossible, he said, to make a distinction between the case of a bill and that of a note. As to the decisions of this court: In *Ambrose v. Hopwood* (a), where the bill was accepted payable at "Messrs. *Freeman* and Co. No. 6, *Church-street, Bermondsey, Southwark*," the court held that it was not even sufficient to aver "that the bill was in due manner shown and presented to the said Messrs. *F. and Co.* for payment, and was dishonoured," without further stating that it was presented to them at the place of payment. In *Callaghan v. Aylett* (b), where the bill was made payable at *Ramsbottom* and Co.'s, it was contended for the plaintiff, that the payment at a particular place was only a memorandum, and no part of the contract; and in support of this argument, the case of *Saunderson v. Judge* (c), was

(a) 2 Tass. 61.—(b) 2 Comp. 549.—(c) 2 Hcn. BF, 509.

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cited. In the latter case, however, the place of payment was a mere memorandum at the foot of the bill; and besides, the bill had come by indorsement into the hands of the person at whose house it was made payable, and it would have been absurd for the plaintiff to have presented it to himself. In giving judgment in *Callaghan v. Aylett*, the court said, that "the place of payment must be considered as part of the contract between the acceptor and the holder; the drawee of a bill might accept it generally or specially; this was a special and qualified acceptance; the defendant undertook, that when the bill became due, it should be paid at *Ramsbottom and Co.'s*, not that he would be liable upon it universally."

Mr. Serjt. *Blaslett*, in support of the declaration, contended: *First*,—That this acceptance was not a limitation or qualification that controlled the liability of the acceptor, but, on the contrary, was an expansion of it: *Secondly*,—But if it were a limitation, that it was not necessary to aver presentment at the particular place. *First*, As to the meaning of "*expansion of the liability*:" The acceptor was liable in the first instance personally, and also at his place of abode, a presentment at which, he considered as good a presentment as if it were made personally: By accepting the bill payable at *Batson's*, (which was not a banking-house,) he had only added another place, at which, though he were not personally there, he engaged to pay; and if he did not, the bill would be considered as dishonoured: He thereby took upon himself a new liability, which otherwise he would not have been subject to; this, therefore, was not an exclusion but an extension of the contract, and this construction was sanctioned by the authority of *Smith v. De la Fontaine*(a), *Lyon v. Sug-*

(a) *B. R. T.* 25 *Geo.* 3. cited *Bayley*, on Bills, p. 129. n. (b) 3d edit. and 13 *East*, 464.

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deu (a), and by Lord *Ellenborough's* judgment in *Fenton v. Goundry*; and the reason of it was, that the acceptor was supposed to be a debtor to the drawer to the amount of the bill, except in the case of an accommodation bill. Before the bill was drawn, those funds, out of which the bill was to be paid, being in the hands of the acceptor, there was no doubt but he was liable to be arrested by the drawer any where. [Mr. Justice *Heath*.—The acceptance does not necessarily imply a debt; it may be in respect of future assets.] The general acceptance, therefore, did not add to his liability, and consequently no inconvenience would arise from considering this as a general acceptance. [Mr. Justice *Chambre*.—Suppose a bill drawn on a man who was going out of town, which would become due while he was out of town, he accepts it payable at his banker's, leaving perhaps nobody in his own house; it would be very inconvenient if he were liable to be arrested wherever he might happen to be, without previous presentment.] [Mr. Justice *Dallas*.—The question is, whether this be not tantamount to an acceptance "payable at *Batson's*, and not elsewhere."] This acceptance, he contended, did not imply payment at *Batson's*, and not elsewhere. It was very difficult, he said, to distinguish between this and a general acceptance: Why, he asked, should not the acceptor at a particular place be subject to the same liability as a common acceptor? Why, if in the case of a common acceptance, the acceptor must prove that he tendered, and was always ready, should the acceptance at a particular place alter his obligation entirely, and make it only necessary for him to prove that he was ready at that particular place? And why should the holder be obliged to prove that he pre-

sented himself at that place? No authority had been cited to prove that it was part of the plaintiff's case so to present himself. Secondly, But if the court should be of opinion that it was a limitation of the contract, he contended that in point of law, as to the pleading, it was not necessary to aver in the declaration presentment at the particular place; which, he said, would be for the creditor to tender himself to his debtor, making a sort of inverted tender. The defendant contended that it was not sufficient to demand at any other place to pay at *Batson's*; but the very demand itself must be at *Batson's*: He had cited, however, no authority in support of this, or to shew that this was a condition precedent. If this were a contract on a condition precedent, it would not be sufficient to declare on a general liability to pay according to the tenor and effect of the bill, but the plaintiff must declare on a liability to pay at *Batson's*. [Mr. Justice *Chambre*.—The subsequent averment of presentment relates back to the contract.] The breach must follow the contract.—As to the cases cited by the defendant, he contended, that the passage from Mr. Justice *Bayley's* treatise was not to be considered as being in his favour; that the case of *Parker v. Gordon* did not apply, being an action against the drawer; the distinction between an action against the drawer and against the acceptor was, that the latter was always liable after acceptance, the former only from the time of the acceptor's default; and not then, unless he had received immediate notice of such default. [Mr. Justice *Chambre*.—In *Parker v. Gordon*, it was taken for granted that the presentment was necessary at the house.] Being an action against the drawer, it was necessary, in order to charge him, that the presentment should have been made at the place. The case of *Bishop v. Chitty*, he said, could not be cited as

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applicable, because there, no question was raised as to the pleadings, nor even as to the necessity of presentment at a particular place; the only point was, whether the plaintiff had not been paid by his having taken a banker's draft. The decision in *Saunderson v. Bowers* was quite at variance with those in *Copp v. Lancaster* (a), and *Rumball v. Ball* (b), in which the court held, that an action on a bill or note payable on demand was a sufficient demand, because the debt was precedent to the demand; and the same doctrine, he said, was laid down in *Birks v. Trippet* (c). The cases in this court, he admitted, were against the plaintiff, but he answered them in the language of the court of *King's Bench*, that a distinction was to be taken between promissory notes and bills of exchange, because in the former, the particular place made a part of the body of the contract; in the latter, it was merely a memorandum that the holder might be paid at that place, wherever the acceptor might personally be; and also that such presentment was at the option of the holder, and therefore it was necessary for his convenience to assign a particular place. The case of *Ambrose v. Hopwood*, however, could not be considered as being much in favour of the defendant, because it was an action against the drawer; and besides, the declaration alleged the bill to have been payable at *F. and Co.'s, at &c.* and certainly it was not sufficient to aver presentment to *F. and Co.* who were not the acceptors, without also stating a presentment at the place, for the acceptor had not undertaken that *F. and Co.* should pay the bill any where. *Callaghan v. Aylett* was a case which had been brought into court on a point reserved at *nisi prius*;

(a) *Cro. El.* 548.—(b) 10 *Mod.* 38.—(c) 1 *Williams's Saund.* 39.

the pleadings therefore were not gone into. On the other hand, the decision in *Fenton v. Goundry* was supported by all the prior authorities, and *Callaghan v. Aylett*, he said, was the first case in which the contrary doctrine had ever been advanced.

Mr. Serjt. *Vaughan*, in reply, was stopped by the court.

Mr. Justice HEATH.—I entirely concur with the judgment delivered in *Callaghan v. Aylett*. This was a qualified acceptance, and it is necessary that the condition should be performed. The holder might have protested against it, and might have resorted immediately to the drawer. It is matter of great convenience that bills should be accepted payable at particular places. I adhere to the former opinion of this court.

Mr. Justice CHAMBRE.—We have only to look at the contract, and to construe that according to the plain and common sense of it : There is no ambiguity in the condition : The general law must take place in general cases. A man is not obliged to accept a bill generally; he may restrict it. The holder is not obliged to submit to the condition, but may resort immediately to the drawer; however, if he do submit to it, he must be bound by the terms of it. As to the decision of the *King's Bench*, in *Fenton v. Goundry*, the reasons given by the court shew that they were very doubtful as to the point; they say the words only shew where the acceptor lives; if that were all that was intended, the acceptor need only write his name and place of abode; but he does more, and imposes a condition by which the holder is bound.

Mr. Justice DALLAS.—The foundation of the plaintiff's argument is, that the acceptor is the drawer's debtor; this is not always so; and in particular branches of trade it is just the reverse : For instance, in the *West India* trade, the merchants are always in advance to the planters,

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and the acceptances are given on the faith of expected remittances. The acceptor has his choice, whether he will accept or no, and if he do, he may accept specially, either as to time or place; if the former, a question might perhaps arise, whether the drawer would not be discharged by it, but still he may do it; so also as to place. If the holder take an acceptance, with a condition expressly excluding any other place, it is not contended but that presentment must be made at that place; it is the same thing if the acceptance be at a particular place, for that is in effect to the exclusion of any other. *Expressio unius est exclusio alterius.*

Judgment for the defendant.

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19th Feb.

DOE, on the dem. of WOODCOCK, v. BARTHOLOP.

A. devises a copyhold estate to trustees to the use of *B.* for her life; then to such uses as *B.* by her last will, should appoint; and in default of such appointment, to the right heirs of *B.* *A.* dies; the trustees are admitted in fee on the trusts declared by the will. *B.*, by an appointment in form of a deed poll, in nature of a will, irrevocably devises all her interest in the premises to *C.*; and declares that no subsequent will should revoke this disposition; the premises are surrendered to the use of *C.* in reversion, and he is admitted accordingly. *B.*, by another will, afterwards devises the premises to *D.* and his heirs, so as not to be subject to any of her debts, contracts or engagements: Under this will *D.* was admitted, and soon afterwards *B.* died:—Held that by the devise to *D.*, the former appointment in favor of *C.* was revoked, and the legal estate divested out of the trustees under *A.*'s will and vested in *D.*; and that a surrender to *D.* by the trustees, was as effectual as if it had been made by *B.*

to have, use, occupy, and enjoy the same, or to pay to, or permit and suffer her, or her assigns, to receive and take the rents and profits thereof during the term of her natural life, and for her own sole and separate use, and not to be in any wise subject to the debts or controul of any husband she might have; and subject to such estate and interest of the said *M. A. Shipwash*, the testatrix devised the said premises to such person or persons, for such estate or estates, use or uses, and at such time or times, as the said *M. A. Shipwash* should, by her last will and testament in writing, or any writing in the nature of a will, executed in the presence of and attested by three or more credible witnesses, give, devise, limit, direct, or appoint; and in default of such gift, &c. and as to so much and such part thereof, of which no such appointment should be made or take effect, or should cease to have effect, or until the same should take effect, the testatrix devised the same to the right heirs of *M. A. Shipwash* for ever.

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Upon the death of Mrs. *Lambert*, the testatrix, which took place shortly afterwards, without her having revoked or altered her will, Mrs. *Shipwash* became entitled to the benefit of the devise therein contained in her favour, and *Kelbam* and *Johnson* were admitted in fee to the premises, on the 6th of *December*, 1791, upon the trusts declared by the will. Mrs. *Shipwash* soon afterwards sold her life interest in the premises, and the trustees surrendered the same, by her direction, to trustees for the purchaser.

On the 16th of *April*, 1798, Mrs. *Shipwash*, under the power contained in Mrs. *Lambert's* will for that purpose, executed an appointment in form of a deed poll, and stamped with a deed stamp, under her hand and seal, by which "she did, by that instrument in writing, in nature of a will or testamentary disposition, irrevocably give,

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“devise, grant, and confirm to *Wm. Bowen*, his heirs and assigns, the said copyhold messuage, &c. and all her estate, right, title, and interest therein, and thereto, from and immediately after her decease: And she did thereby declare, that all persons claiming through or under her, should do all necessary acts for confirming the title of the said *W. Bowen*; and that no subsequent will to be made by her, should be construed or deemed to revoke the disposition thereby made of the said premises in favor of the said *W. Bowen*, the same having been made fairly and *bonâ fide*, for a valuable consideration in money.”

On the 24th of *August*, 1798, the trustees under *Mrs. Lambert's* will surrendered the premises to the use of *Bowen*, his heirs and assigns, for ever, in reversion expectant on the death of *Mrs. Shipwash*, and he was admitted accordingly. *Bowen* afterwards sold the reversion to *P. R.*; *P. R.* sold it to *J. M.* and *J. M.* to the defendant.

On the 28th of *February*, 1811, *Mrs. Shipwash* made a will, by which she gave and devised the premises in question to *Woodcock*, the lessor of the plaintiff, his heirs and assigns, “subject to no debts, contracts, or engagements by her contracted to any person or persons or husband now in possession;” under this will *Woodcock* was admitted, by virtue of a surrender to him by the trustees, and on the 29th of *February*, *Mrs. Shipwash* died: At her death the defendant took possession, and this action was brought by *Woodcock*, as devisee under the will of the 28th *February*, 1811.

At the trial of this cause before Lord Chief Justice *Mansfield*, at *Westminster*, at the sittings after last *Trin.* term, it was considered that if the appointment executed to *Bowen* on the 16th of *April*, 1798, were a testamentary disposition under the power contained in *Mrs. Lambert's* will, it was in its nature revocable, and

therefore was revoked by the subsequent will made by Mrs. *Shipwash* in favor of the lessor of the plaintiff; and that if it were not testamentary, it would pass nothing, and accordingly the plaintiff recovered.

In *Michaelmas* Term, Mr. Serjt. *Lens* moved to set aside this verdict and enter a nonsuit, on a point reserved at the trial; viz. that as the premises, being copyhold, were not subject to the statute of uses, the legal estate was in the trustees under Mrs. *Lambert's* will, who surrendered them to *Bowen*, under whom the defendant claimed. He admitted that the defendant had a bad title, but he contended that the subsequent limitations and devises in the will were simple trusts, not abridging the devise to the trustees, and that, therefore, the plaintiff, who could only recover by the strength of his own title, could not succeed in this action. A rule *nisi* was accordingly granted.

Mr. Serjt. *Onslow*, on the 9th of *February*, in this term, shewed cause.—He contended that the estate went out of the trustees at the death of Mrs. *Shipwash*. There were two distinct devises, one to the trustees during her life, the other, to take place at her death, to her appointees: It was a mere question of construction, and had nothing to do with the statute of uses. The estate was given in trust for Mrs. *Shipwash* for her life, and subject to her appointment by will; the trust therefore began and ended with her immediate interest. He was stopped by the court, and the other side called upon to go on.

Mr. Serjt. *Lens*, and Mr. Serjt. *Copley*, *contra*.—The estate being copyhold, and the conveyance to the trustees under Mrs. *Lambert's* will being to them and their heirs, it could not be divested out of them, without a surrender by them in the lord's court. They contended that this was not a devise to the trustees, limited to the duration of Mrs. *Shipwash's* life; but that it was a devise to them

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and set it out, and also set out the indenture to which it referred, and then pleaded performance of the covenants generally in the words of it, and concluded with a verification. The plaintiffs, without assigning any particular breach in their replication, merely denied the performance of the covenants, as alleged in the defendant's plea, and concluded to the country; they then proceeded thus: And for assigning of breaches of the covenants in the said indenture, in the said condition of the said writing obligatory mentioned, the plaintiffs say, &c. setting forth several breaches of duty on the part of *Osborn*.—The rejoinder took issue upon the replication.

At the trial of the cause at *Westminster*, at the sittings after last *Trinity* term, before Lord Chief Justice *Mansfield*, the jury found a verdict for the plaintiffs, on the breaches assigned by them in the manner above stated; and Mr. Serjt. *Shepherd* and Mr. Serjt. *Rough*, in *Michaelmas* term, moved in arrest of judgment, on the ground that the issue left to the jury was not the issue on record; which, they contended, was only on the question of general performance. The plaintiffs, they said, should have assigned breaches, according to the stat. 8 & 9 *W. 3* (a), which, they said, was imperative upon them so to do, and then issue might have been taken on them. It might have been necessary for the defendant to have rejoined specially, but by this replication he had been deprived of the opportunity of doing so. They cited *Sayer v. Peck* (b), as an authority to show, that where no issue has been joined, the judge has no power over the record. [Mr. Justice *Heath*.—There is no doubt upon that point; the only question

(a) c. 11. s. 8.—(b) *Comp.* 407.

here is, whether issue has *not* been joined; or, at least, whether this be not a matter amendable after verdict.] They then cited *Cooper v. Spencer* (a), in which the defendant having pleaded *son assault*, the plaintiff replied, *de injuriâ sua propriâ*, and went to trial without any *similiter* on the part of the defendant, and the court of *King's Bench* held that the defect was not amendable after verdict; and *Gainsford v. Griffith* (b). A rule *nisi* was accordingly granted.

On a former day in this term, Mr. Serjt. *Best* shewed cause, and contended: *First*, That sufficient issue had been taken; and that, therefore, the cases which had been cited by the defendant were not applicable. He admitted, that the statute was imperative on the plaintiffs to assign breaches; but, he said, there was no case which had decided that there was any particular place where they must be assigned. [Mr. Justice *Chambre*.—The usual way is for the defendant to plead performance generally, and the plaintiff then sets out the breaches; but here issue has been taken on the general performance. The question therefore here is, whether, after this issue had been taken, the plaintiffs could assign breaches.] The plaintiffs, after their replication, had assigned breaches, to which the defendant had given no answer, and which, therefore, stood confessed. If this judgment were to be arrested, the defendant would be taking advantage of his own wrong, in not answering the breaches which had been assigned. The rule, he said, was that the plaintiff must take every issue offered him by the defendant, and this the plaintiff in this case had done; and the particular instances in which the defendant had

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(a) 1 Str. 641. 8 Mod. 376. S. C.—(b) 1 Williams's Saund. 58. n. (1) where the rules respecting the pleading on this statute are laid down.

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broken his covenant were pointed out by the subsequent assignment of breaches. The defendant could not say there was no issue, merely because he had refused to take issue on the breaches which had been assigned. *Secondly*, But even if this mode of pleading were not strictly correct, and though perhaps it would have been more regular to have inserted the breaches in the body of the replication, still, he contended, that the objection came too late after verdict: It might have been the foundation of a demurrer, but it could not be a ground on which to move in arrest of judgment. From the principles laid down in *Bennet v. Holbeck (a)*, it was to be collected that an issue could not be objected to, after verdict, for generality, or any other formal defect. Issue, he said, had not been joined on an immaterial point, for the issue here was sufficient to decide the cause; and having been found for the plaintiffs, nothing remained to be done but to assess the damages. He cited *Cooke v. Burke (b)*, where the parties having gone to trial on a plea which had not been traversed, the court permitted the plaintiff, who had obtained a verdict, to amend the record by adding a traverse, and discharged the defendant's rule to arrest the judgment.

The *Solicitor-General* and Mr. Serjt. *Rough contra*, contended that it was impossible for the defendant to deny the breaches which had been put on the record, after issue taken on another point: The plaintiffs had *suggested* breaches instead of *assigning* them, and on the authority of the case of *Gainsford v. Griffith*, above cited, the defendant could not plead to breaches which had only been suggested; the court, therefore, was required to give judgment for damages on breaches, which the defendant

(a) 2 *William's Sound*. 319. n. (6).—(b) 5 *Town*. 164.

had had no opportunity of answering. The question, they said, was not whether the issue on which the jury found their verdict were material or immaterial, but whether it were the issue on the record. They concluded that, as the plaintiffs had, in effect, assigned no breaches, they were, at all events, only entitled to recover as they might have done before the statute.

The court took time to consider; and on this day, Mr. Justice HEATH delivered the judgment of the court:—He said, the opinion of the court under all the circumstances was, that there ought to be a repleader. The plaintiffs, in their replication, had tendered an issue which was bad at common law, and not justified by the statute; they ought to have assigned breaches, and then the defendant would have had an opportunity of answering them. On the other hand, the defendant had pleaded to this, instead of demurring, as he ought to have done; the judgment, therefore, must be, that there be a repleader.

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SAWTELL v. LOUDON.

Saturday,
 Feb. 12.

THIS was an action on a policy of insurance, which was effected the 3d of December, 1812, on the ship *Sophia*, at and from *Bristol* to *Port Mahon*, with leave to call at *Gibraltar*, and take in and discharge goods there; and with liberty to seek, join, and exchange convoy in the *English* and *Irish* channels, with or without letters of marque. The words, "*on ship*," were afterwards struck through with a pen, and the following memorandum was inserted in the margin of the policy, signed with the ini-

If the declaration of interest in a policy of insurance be altered by striking out the words "*on ship*," and inserting the words "*on goods*, as interest may appear," and the insured have no interest in the ship, a new stamp

will not be necessary.—If a letter, stating that "the ship, which ought to have gone to *Falmouth* to join convoy, had been seen at sea without convoy, and that this was supposed to have been occasioned by contrary winds," be not communicated to the underwriters, it is a material concealment.

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tials of the underwriters. "The interest insured by this policy is declared to be on goods, as interest may appear, including all charges incident to a loss, and to pay average on each package, as if separately insured. *London, 7th December, 1812.*" The plaintiff was charterer of the ship. The ship had sailed from *Bristol* on the 19th of *November*, with a cargo, to join convoy at *Falmouth*; but owing to bad weather was not able to make the latter port; and before she arrived at *Gibraltar*, had sustained the damage which occasioned the average loss sought to be recovered in this action. The cause was tried at the sittings in *London*, after last *Michaelmas* term, before Lord Chief Justice *Mansfield*, when the jury found a verdict for the plaintiff, for the amount of the average loss. Mr. Serjt. *Best*, on a former day in this term, obtained a rule *nisi* to set this verdict aside, and enter a nonsuit, on two grounds: *First*, That the above alteration of the interest from ship to goods, rendered a new stamp necessary; and that therefore the policy was void by virtue of stat. 35 *Geo. 3. c. 63. (a)* In support of this objection, he cited *Hill v. Patten (b)*, where the court of *King's Bench* held that a policy on "ship and outfit," could not be altered, after the ship had sailed and the risk had attached, to an insurance on "ship and goods," without a new stamp. *Secondly*, He moved on the ground of the concealment of a material letter from the underwriters. This letter, which was dated the 6th

(a) The 13th section of that stat. provides, that "nothing in the act contained shall be construed to prohibit the making of any alteration, which may lawfully be made in the terms or conditions of any policy, duly stamped, after the same shall have been underwritten, or to require any additional stamp duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, and the premium exceed the rate of 10s. *per cent.* on the thing insured, and so that the thing insured shall remain the property of the same person or persons," &c. — (b) 8 *East*, 373. See also *French v. Patten*, 9 *East*, 351.

of *December*, 1812, was written by the plaintiff to the broker, who effected the policy, in answer to some inquiries made by the latter respecting the ship; it appearing by *Lloyd's* books, that a ship called the *Sophia*, of *Bristol*, had been seen at sea without convoy. The letter was to the following effect. "The *Sophia*, you allude to, "is the vessel on which you effected the insurance, "which ought to have been on goods; be so good "as to get this rectified. I chartered the brig" (meaning the *Sophia*), "and she was to have gone to *Falmouth*, as I "understand, to join convoy; but I suppose the wind was "contrary, and she could not fetch the port; but I know "nothing about it myself."

The *Solicitor-General* and Mr. Serjt. *Vaughan*, on a subsequent day in this term, shewed cause against this rule on the first ground, and distinguished this from the case of *Hill v. Patten*, because there the insured was owner, and interested in the outfit: Here, on the contrary, the plaintiff had no interest in the ship, and he might have recovered immediately, as for a return of premium; and therefore the contract was inefficient, and fell within the principle on which the case of *Cole v. Parkin* (a) was decided: Lord *Ellenborough*, in delivering the opinion of the court on that case, said, that where the instrument on its execution was void, and where its insufficiency arose from a mere mistake, and the second execution was only to put it in the state in which it was originally intended to have been, no new stamp was necessary. They admitted that, in this case, if the insured had had any interest which could have been covered by the policy, so that the instrument might have been operative, it could not have been altered

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(a) *East*, 471.

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without a fresh stamp; but here there was nothing on which it could operate; the instrument, therefore, was wholly inefficient and void. They compared this to the case of a deed of conveyance, in which the estate intended to be conveyed had been described as situated in a wrong county; the insertion of the proper county would not, they said, make it a new instrument; it was only correcting a mistake: Not so, if the deed, in its original form, could have operated at all, and had been *functus officio*. They contended, that by the very terms of the 8th section of the act (a), the party was entitled to make this alteration without a new stamp; for if he had carried it to the stamp office, he would have been allowed the stamp; this, therefore, was no evasion of the duty, no fraud on the revenue. As to the 13th section of the act, alterations were by that permitted to be made in policies, provided they were made before notice had been given of the determination of the risk, and the thing insured remained the property of the same person. In this case the risk had not attached, and the thing insured remained the property of the same person. Where then was the necessity of a new stamp? They cited the case of *Kershaw v. Cox* (b), where it was holden that in the case of a bill of exchange, which had been passed by indorsement, the insertion of the words, "or order," did not make a new stamp necessary.

Mr. Serjt. *Best contra*, contended, that his first objection had not been answered: The eighth section of the act,

(a) By that section it is enacted, "That any stamped vellum, &c. which shall be inadvertently spoiled, obliterated, or otherwise rendered unfit for use, may, within the time therein prescribed, be carried to the commissioners of the stamp duties to be cancelled; and in case no sums of money, or names of underwriters be subscribed thereon, or such sums or names have been subscribed on stamps of a different value than is required by the act, such stamps shall be cancelled, and other stamps of the same value shall be given in exchange for them."—(b) 3 *Esp. N. P. Cases*, 246.

he said, was by no means in the plaintiff's favour; because that required the party to take the instrument which had been injured or effaced, to the office, which in the present case had not been done. The thirteenth section, he said, did not authorise alterations of the thing insured; it only applied to a different mode of insuring the same property, and it would be opening infinite frauds on the revenue, if this policy were permitted to remain effectual. This case, he said, was very distinguishable from that of *Cole v. Parkin*, because there the contract was absolutely void *ab initio*, here the instrument was efficient; and though when two parties make an agreement on a subject which they did not mean to contract upon, it might be invalid as between themselves; yet, he contended, that the contract was so far valid as to make a new stamp necessary, if the instrument were altered.

The court, without hearing any argument on the second objection, took time to consider this point, and Mr. Justice *Heath*, on this day, delivered the opinion of the court, which was, that the alteration was not such as to require a new stamp: He said it appeared clearly to have originated in a mistake, and that the policy, in its original form, though it had the semblance of a contract, was in fact no policy at all, since the risk did not commence; it was such a mistake, therefore, as might be corrected without a new stamp (a).

The *Solicitor-General* and Mr. Serjt. *Vaughan* then shewed cause against the rule, upon the second objection:

(a) See the case of *Langhorn v. Cologan*, 4 Taun. 330, where a policy was effected in the usual printed form, without any words descriptive of the subject matter of the insurance. After some of the underwriters had subscribed, the insured inserted certain goods. The court held that this was a material alteration, and that the policy was void as to those who did not consent to the alteration.

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viz. That the letter above recited contained information which ought to have been communicated to the underwriters. They contended that the vessel having been insured, "*with or without letters of marque,*" the plaintiffs had a right to consider her as a running ship, and that, therefore, it was not necessary that she should sail with convoy; but independently of that, the letter only stated that she had been seen at sea, not in distress or danger; she was therefore so far advanced on her voyage, and the risk, consequently, rather diminished than increased; and the conclusion of the letter, they said, proved that even this was only conjecture; the question, therefore, was whether the insured was bound to communicate every suspicion and surmise, which might arise in his own mind.

Mr. Serjt. *Best contra*, denied that the ship had a right to sail without convoy, and contended, therefore, that her having been seen at sea without convoy was a material fact. It had been observed by Lord *Mansfield*, that in these cases, *uberrima fides* should prevail; but in this case, there appeared to have existed no faith at all.

The court being unanimously of opinion that this was a material fact, and ought to have been communicated, the rule was made absolute for a new trial (a).

(a) The cause was accordingly tried a second time at the sittings after the term, before Lord Chief Justice *Gibbs*. His Lordship, after recapitulating the facts, which appeared the same as on the former trial, and observing that it was incumbent on the insured to relate nothing but what was true, and to state every thing relating to the transaction which was within his knowledge, told the jury that it was a question entirely for their determination; and they again found a verdict for the plaintiff.

END OF HILARY TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

IN

EASTER TERM,

IN THE

FIFTY-FOURTH YEAR OF THE REIGN OF GEORGE III.

Memoranda.

In the last vacation, the Right Honourable Sir *Vicary Gibbs*, Lord Chief Baron of the *Exchequer*, was appointed Lord Chief Justice of the court of *Common Pleas*, on the resignation of Sir *James Mansfield*, and on the 24th of *February*, took his seat at *Guildhall*, at *nisi prius*: He was succeeded in the office of Chief Baron by the Honourable Mr. Baron *Thomson*, since made a Privy Counsellor.

Richard Richards, Esq. one of his Majesty's counsel, and Chief Justice of *Chester*, was appointed one of the Barons of the *Exchequer*, and was called to the degree of Serjeant at Law, on which occasion he gave rings with the motto "*lex est ratio summa*." He afterwards received the honour of Knighthood.

Sir *William Garrow*, his Majesty's Attorney-General, succeeded Mr. Baron *Richards* in the office of Chief Justice of *Chester*.

1814.

Wednesday,
April 27.

KINGSNORTH v. BRETTON AND ANOTHER.

A. being convicted of sporting contrary to the game laws, is required to bring his dog to the magistrate, who orders it to be immediately shot: held that the magistrate was justified under the 8 Ann. c. 14. s. 4.

THIS was an action against the defendants, a magistrate of the county of *Kent*, and his clerk, for killing the plaintiff's dog; and was tried before Lord Chief Baron *Thomson* at the last assizes for that county.—It appeared that the plaintiff had been summoned before the magistrate, on a charge of sporting without a qualification, contrary to the game-laws, and was convicted of that offence in the penalty of £5. He was then ordered to bring his dog, which he was accustomed to use in killing game, to the magistrate's house; and the dog being produced, the defendants, after conferring together on the subject, ordered it to be shot, which was immediately done. It was contended on the part of the defendants, that by the stat. 5 Ann. c. 14. s. 4. (a) they were justified in thus destroying the dog; and the Chief Baron, concurring in that opinion, directed a nonsuit.

The *Solicitor-General* now moved to set aside this nonsuit, and contended, that though the magistrate might have taken the dog to his own use, he had no right to order it to be shot; it never having been in his possession, so as to vest the property in him.

Lord Chief Justice *GIBBS*.—There is no doubt but the magistrate had a right to take the dog into his possession; neither is there any doubt, that having so taken it, all the

(a) By that section it is, amongst other things, enacted, "that if any person not qualified so to do, shall keep or use any greyhounds, &c. or any engines to kill and destroy the game, he shall forfeit upon conviction the sum of £5; and that it shall be lawful for justices of the peace, and lords of manors, to take away game from any person not qualified to kill the same; and to take away such dogs, nets, or other engines which shall be in the power or custody of any person not qualified to keep the same, to their own proper use, without being accountable to any person for the same."

right of the former owner ceased, and the defendants could not be called to an account for any thing done by them afterwards. At the examination of the plaintiff before the magistrate, it appeared that he was unlawfully possessed of the dog, and he was therefore ordered to deliver it up; that being done, the magistrate, after he had communicated with his clerk on the subject, ordered it to be killed; undoubtedly, therefore, he meant to exercise the power which had been given him by the statute. The rest of the court concurring with the Chief Justice,

The rule was refused.

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KINGSWORTH
v.
BRETTON.

KING v. JONES.

Thursday,
April 28.

THIS was an action of covenant, in which the plaintiff declared, as son and heir of *John King* deceased, against the executors of *Richard Griffith*, on a covenant made on the 7th of October 1794, between *Thomas Worge* of the first part, *Richard Griffith* and *Mary* his wife of the second part, and *John King*, deceased, of the third part, witnessing, that in consideration of £900 paid by *John King* to *Thomas Worge* in discharge of a mortgage debt, and of £855 paid to *Robert Griffith* and his wife, *Thomas Worge*, with the consent of *Robert Griffith* and his wife, did bargain, sell, assign, alien, and release; and *Robert Griffith* and his wife did bargain, sell, alien, release, and confirm to *John King*, his heirs and assigns, a certain messuage in the parish of *Beachampton*, in the county of *Buckingham*, to hold to him, his heirs and assigns, for ever; and that *Richard Griffith*, for himself and his wife, and their heirs, executors, and administrators, did covenant with *John King*, that they, their heirs, &c. would

On a covenant for further assurance, where the breach happened in the time of the covenantee, but the damage accrued to the heir; the heir has a preferable title to the executor, to bring the action of covenant.

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 KING
 v.
 JONES.

do all acts, &c. for the further assuring of the said messuage to the use of him, his heirs and assigns, for ever:— That *John King* entered, and was seised by virtue of this grant, and being so seised, died on the 1st of *December* 1797, whereupon all his estate and interest in the said messuage came to the plaintiff as his son and heir, and he became seised thereof. The breach assigned was, that *John King* in his lifetime, viz. on the 10th of *October* 1795, did request *Richard Griffith* that he and his wife would levy a fine, to pass the estate to the said *John King*, his heirs and assigns; but that the said *Richard Griffith* refused so to do: By means whereof, after the death of *John King*, and before the commencement of this suit, viz. on the 1st of *June*, 1810, one *Isaac Johnson*, devisee of *Mary*, the wife of the said *Richard Griffith*, ejected the plaintiff from the possession of the said messuage, and kept him so ejected from thence hitherto. The defendants pleaded, *first*, *non est factum*; *secondly*, no request by the plaintiff's father; *thirdly*, that *Richard Griffith* and *Mary* his wife, would, for levying the said fine, have been compelled, and compellable, to travel from their place of abode to the court of *Common Pleas* at *Westminster*; and on these pleas issues were taken.

At the trial of the cause at *Aylesbury*, at the spring assizes, 1813, before Mr. Serjt. *Marshall*, the plaintiff proved the deed, as stated in the declaration, and that his father had applied in his lifetime to *Griffith*, to levy a fine, who promised to do so, but that it never was levied. It also appeared, that *John King* the father died in 1797, *Richard Griffith* in 1804, and *Mary Griffith* in 1805, having first devised her real estate to the said *Isaac Johnson*, who filed a bill in equity against the present plaintiff, and recovered possession of the premises, by a decree of the court of *Chancery*. Under these circumstances, the jury found a verdict for the plaintiff for £955,

being the original purchase money, together with £100 for interest.

Mr. Serjt. *Shepherd*, (now *Solicitor-General*) and Mr. Serjt. *Blisset*, in *Easter* term, 1813, moved in arrest of judgment, on the ground that the covenant having been broken in the lifetime of *John King*, his heir could not maintain an action for that breach. They cited *Lucy v. Levington* (a), where the court held, that on a covenant by the defendant with the testator, his heirs and assigns, to levy a fine, the breach having taken place in the testator's lifetime, the action was well brought by the executor.

1814.
KING
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A rule *nisi* was accordingly granted, and in *Michaelmas* term last Mr. Serjt. *Sellon* shewed cause.—He contended, that as the covenant was with *John King* and *his heirs*, and as, though the breach was in the time of the ancestor, no actual damage had accrued till after his death, the heir, who alone had sustained the damage, was entitled to his action; for if the fine had been duly levied, the heir would have had the land. A covenant for further assurance, or to levy a fine, he said, was a real covenant, and therefore was one which runs with the land. The ancestor had entered and remained in possession till his death; the effect of the breach of covenant, therefore, was in the time of the heir, for till the ancestor's death *non constat* that the possession would be ever disturbed.—He cited *F. N. B.* 145, *Vin. Ab. Covenant* H. 5.—“If a man make a covenant by deed to another and his heirs of the manor of *D*, &c. : Now if he will not do it, and he to whom the covenant is made dieth, his heir shall have a writ of covenant upon that deed; and also his assigns, when the covenant is made to him and his assigns.” This, he said, was a general rule, and applicable to all cases. It made no difference whether the covenant were broken in the life-

(a) 1 *Ventris* 175; 2 *Levinz* 26.

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time of the testator or not.—In *Middlemore v. Goodale* (a) the defendant covenanted for himself, and his heirs, with the feoffee, his heirs and assigns, to make further assurance; the court held, that this covenant went with the land, and that therefore the assignee should have the benefit of it.—In *Wotton v. Cooke* (b), three had purchased jointly in fee, and each covenanted with the others and their heirs, *et eorum utroque*, that the survivor of them would make such conveyance to the heirs of the others as they should devise: It was held that this covenant was peremptory on the survivor, and, though not annexed to the land, went to the heir, who, on tender of a conveyance, and refusal to execute it, might immediately sue. He also cited *Palmer's Reports* 558, to shew that if one covenant with A. and his heirs, to convey land to him and his heirs, there the feoffment shall be to the heir; for the heir shall have covenant.—As to the case of *Lucy v. Levington*, which had been cited by the other side, that only proved that the executor *mights* bring the action; but that, he said, was not the point in dispute; the question was, whether the heir were not entitled to sue.

Mr. Serjt. *Shepherd*, and Mr. Serjt. *Blosset*, *contra*, insisted that this case differed essentially from those which had been cited on the part of the plaintiff. They said, there was a distinction to be taken between covenants broken, and those which had not been broken.—A covenant for further assurance, they admitted, ran with the land; but a covenant broken did not, as to the identical breach, run with the land. A covenant for further assurance was broken as often as it was refused; the covenantor being bound to do all acts, *soties quoties*, which he should be required to do (c). The meaning of a covenant running with the land was, that the covenantee

(a) *Cro. Car.* 503, 505.—(b) *Dy.* 337. b.—(c) *Com. Dig.* tit. Condition. H.

should have damages for the covenant broken during his life, and the heir for breaches which occurred in his time: In this case, therefore, *John King* the ancestor might have sued for this breach in his lifetime; the present plaintiff could only sue for breaches which happened subsequently to his father's death, which took place in 1797; the original covenantor did not die till 1804; the plaintiff was in possession for the whole of that period; he might therefore have made a new request, and if that had been refused, he might then have brought his action; having neglected, however, to make any such request, and declared on the covenant made to his father, and on a breach in his father's lifetime, he had only his own neglect to complain of.—The right of action, they contended, must be complete to the person suing: Here, though the damage consisted in the eviction, the refusal to levy the fine constituted the breach. The cases which had been cited from *Gr. Car.* and *Palmer's* reports, only established, that where one covenants to enfeoff a man and his heirs, the heir may take advantage of it; but they distinguished the case of a feoffment from that of a covenant for further assurance, because in the latter case there was no breach until there had been a request and refusal; as a covenant for quiet enjoyment is not broken till eviction:—Not so on a covenant that a man has a title to convey, for there the covenantee may sue at any time; because, if the covenantor fail in his title, the covenant is always broken, without reference to any particular breach. They distinguished the case of *Wotton v. Cooke* from that before the court, by the circumstance of the parties to the covenant in the former case being parceners.—On the authority of *Lucy v. Levington* above cited, they concluded that if the testator could have sued, the right of action devolved on his executors.

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Lord Chief Justice MANSFIELD.—There is no doubt but the testator might have recovered the whole value, unless the defendant would have assured the estate to him.

The court took time to consider of this question; and on this day, Mr. Justice *Heath* (Lord Chief Justice *Mansfield* having resigned since the case was argued) delivered the opinion of the court.

The question in this case is, whether the heir at law be entitled to recover. It is admitted, that a covenant for further assurance runs with the land: The heir therefore might call on the covenantor to levy a fine; certainly to reverse any judgment. It appears that the plaintiff's father was a willing purchaser, and gave time to the covenantor to levy the fine. Under these circumstances, we are of opinion, that the heir has a preferable title to bring this action. He represents his ancestor in the real estate, in the same way as the executor represents his testator with regard to his personal property. As to the authorities which were cited:—In the case from *F. N. B.* the covenantee might have brought his action, yet the heir had it in preference to the executor. In *Wotton v. Cooke*, the heir was also held to be entitled to his action, and that decision was affirmed on a writ of error in the *King's Bench*.—There is a more recent case of *Kingdon v. Nottle (a)*, which was decided last *Easter* term in the *King's Bench*, where the court held, that an executrix could not support an action on a covenant, “that the defendant, at the time of executing the deed, was seised in fee and had a right to convey,” without shewing some special damage to the testator in his lifetime; or that the plaintiff claimed some interest in the premises.—The case of *Lucy v. Levington* is very distinguishable from the present,

(a) 1 *Maule and Sel.* 355.

because there the damage was sustained in the time of the ancestor. There must therefore be judgment for the plaintiff.

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Rule discharged.

GRAVES v. EADES.

Thursday,
April 28.

Mr. Serjt. *Vaughan*, in the last term, obtained a rule calling upon the plaintiff to shew cause, why the execution which had been issued and executed in this cause should not be set aside, on the ground that the action had been settled between the plaintiff and the defendant. It appeared by the affidavits, that the plaintiff had obtained judgment against the defendant for the sum of £109: 5s. damages and costs, and that while the sheriff was in possession of the defendant's goods under a writ of *testatum fieri facias*, which had been issued on the judgment on the 22d of *January*, the defendant applied to the plaintiff's attorney, offering to settle the action; that the attorney refused; upon which the defendant went to the plaintiff himself, and paid him the debt and costs, partly in cash, and partly in acceptances, taking a receipt from him for the amount; and having paid the sheriff's poundage and other fees, obtained possession of his goods. On the 4th of *February* the defendant received a notice in writing from the plaintiff's attorney, informing him that as he, together with the plaintiff, had caused the sheriff to withdraw from the possession of his effects without the consent of the plaintiff's attorney, and without his costs, amounting to £59: 3s. being first paid; unless they were paid before the 7th of *February*, he should proceed for the recovery thereof. The costs not being paid on the 7th of *February*, the plaintiff's attorney, on

If the plaintiff and defendant collusively settle the debt and costs upon an execution, in order to defraud the plaintiff's attorney of his costs, the plaintiff's attorney cannot sue out a second execution on the same judgment to levy his costs, but must apply to the court.

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the 9th of the same month, sued out another writ of *testatum fieri facias* against the defendant, upon the same judgment, indorsed to levy £59 : 5s., by virtue of which the sheriff entered.

The *Solicitor-General* shewed cause against the rule on an affidavit of the plaintiff's attorney, that he believed the payment to have been made by collusion between the plaintiff and the defendant, in order to defraud him of his costs, and he cited the case of *Welsh v. Hole* (a), where Lord *Mansfield* held that if an attorney give notice to the defendant not to pay the debt till his bill be discharged, payment by the defendant, after such notice, would be in his own wrong, and would be like paying a debt which had been assigned, after notice; and in *Read v. Dupper* (b), the court of *King's Bench* held that if the defendant's attorney pay to the plaintiff his debt and costs after notice from the plaintiff's attorney, he will be liable to pay to the latter the amount of his lien on such debt and costs.

Lord Chief Justice GIBBS.—In the present case there had been one execution, which was got rid of by the settlement between the plaintiff and the defendant. The plaintiff's attorney then takes out a second execution; should he not rather have moved the court for a rule to shew cause why the defendant should not pay him his bill of costs? Is there any case where it has been decided that an attorney may take out execution in his client's name, against the consent of that client? He has chosen to deal for himself, instead of applying to the court; this cannot be allowed.

Per Curiam.—Rule absolute, the defendant engaging to bring no action (c).

(a) *Doug.* 238. 3d edit.—(b) 6 *T. R.* 361.—(c) See *Tidd's Practice*, p. 392. 5th edit.

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TOMKINS v. WILTSHIRE,

Friday, April 29.

THIS was an action to recover the sum of £104 on a balance of accounts. The plaintiffs were bankers, with whom the defendant had kept cash. In 1808 a balance was struck, and from that time till 1811 many sums had been paid in and drawn out, without any balance having been struck; and it was then found that the defendant was indebted to the plaintiffs in the sum sought to be recovered in the present action.

Assumpsit lies to recover the balance of a banker's account, however voluminous it may be; and the plaintiff in such case is not obliged to bring account.

The cause was tried before Mr. Baron *Richards*, at the last assizes for the county of *Sussex*, when it was objected on the part of the defendant, that it ought to have been an action of account, and not *assumpsit*, on the authority of *Scott v. McIntosh* (a), where on *assumpsit* to recover the balance of an account which had been running between the parties for several years, and which consisted of several thousand items, Lord *Ellenborough* held that an action of account was the proper remedy, upon which the plaintiff submitted to a nonsuit. *Lincoln v. Parr* (b) was also cited, and *Gilbert's Evidence*, p. 169, 6th edit. where it is laid down that "on *indebitatus assumpsit* no evidence can be given of an account current, because such examination would be too tedious upon issues; and therefore upon this case an action of account is provided, &c." The learned Judge was desirous that the cause should go to a jury, but reserved this question for the consideration of the court. The *Solicitor-General* accordingly now moved to set aside the verdict, and enter a nonsuit on this ground, and he referred to the cases above cited.

(a) 2 Camp. 238.—(b) 2 Keb. 781.

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Lord Chief Justice GIBBS.—A sad use is made of these *nisi prius* cases. *Scott v. M<sup>c</sup>Intosh* was a case which never could have been tried; and there is a decency in counsel in not pressing such cases to a conclusion. The foundation of an action of account is that the party wants an account, and is not able to prove his items without it. But if he can prove that a certain sum has been received in so many different payments, and that a certain other sum has been paid out in so many other different payments, the remainder is certainly money had and received. Where would you stop? On the principle which you are endeavouring to establish, no action could ever be brought by or against a banker, except an action of account.

*Per Curiam,*

Rule refused (a).

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(a) See *Com. Dig. tit. action on the case on assumpsit (A. 1.)*, where it is laid down that *assumpsit* lies in every case where *account* would lie; and refers to 1 *Salk.* 9, the case of *Wilkin v. Wilkin*, where on *assumpsit* for the proceeds of a box and goods, which the defendant promised to dispose of beyond sea, and account for them to the plaintiff, it was objected that it ought to have been an action of account; but the objection was overruled, and Lord Chief Justice Holt said, "There is some inconvenience in giving a long rambling account in evidence to a jury: But wherever one acts as bailiff, he promises to render an account." This case is also reported in *Show.* 71, *Comb.* 149, in which latter report Lord Holt is stated to have said that it would be inconvenient to permit an *assumpsit*, by reason of the trouble and length of accounts; But Mr. J. Dolben held that case would lie, because account was a tedious and troublesome action. *Adjournatur.* The same case is likewise reported in *Carth.* 89. There three of the judges are said to have held that the action of *assumpsit* would lie: But Lord Holt doubted, and told the plaintiff he would not permit him to give all the account in evidence, or to enter into the particulars thereof, but that he should direct his proof only as to the damages sustained for not accounting according to the promise; for he would not travel into the account in such actions. The reporter adds,—*Note*, the trial was to be before him at the sittings.

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FOLEY v. MOLINE.

Friday, April 29,

THIS action was brought to recover the amount of the defendant's subscription to a policy of insurance, which was effected the 3d of *November*, 1810, by Messrs. *Olive* and *Britten*, as agents for the plaintiff, on the ship *New Success*, at and from *Youghall*, a port on the south-east coast of *Ireland*, to *Weymouth*. At the trial of the cause at the sittings after last *Hilary* term at *Guildhall*, before Lord Chief Justice *Gibbs*, it appeared that the plaintiff had written from *Lismore*, near *Youghall*, on the 25th of *October*, 1810, to a Mr. *Hyde* at *Weymouth*, to the following effect: "On receipt, you will please to order an insurance, should the vessel not arrive before you receive this letter. The vessel will sail this evening or to-morrow." Mr. *Hyde* received this letter on the 1st of *November*, and on the 2d he wrote to Messrs. *Olive* and *Britten*, in *London*, to effect the insurance, without sending them a copy of the plaintiff's letter, or communicating the contents of it to them. The policy was effected on the 3d of *November*; the ship had sailed on the 25th of *October*, and on the 28th was off *Weymouth*, when she was driven by stress of weather upon the *French* coast, and was there stranded and captured. Mr. Serjt. *Best*, for the defendant, objected that the plaintiff's letter to *Hyde* ought to have been communicated to the underwriters; and he cited *Willes v. Glover* (a), where on a policy on goods from *Berderygge* to *London*, effected by the consignees on the 13th of *December*, without communicating a letter received by them the day before, dated the 30th of *November*, informing them that the ship would sail the next day, and directing them, if she should not be arrived, to effect

The time of a ship's sailing is not, in general, a circumstance necessary to be communicated to the underwriters, except in the case of a missing ship.

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(a) 1 N. R. 14.

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the insurance as low as possible, the court held that this was a material concealment, though the ship did not in fact sail till the 24th of *December*. The Chief Justice, however, said that that was the case of a missing ship; but in the present case, as it was proved that the usual time for performing the voyage in question was eight or ten days, and as the time which had elapsed between the day when the ship was expected to sail, and in fact did sail, and that on which the policy was effected, was only nine days, his lordship held that she was not to be considered as a missing ship, and therefore directed a verdict for the plaintiff.

Mr. Serjt. *Best* now moved that this verdict should be set aside, and a new trial granted; and contended that though the letter should have arrived before the ship could have been reasonably expected, it might sometimes be necessary to shew it; and that the time of the ship's sailing was a material fact, even though she could not be considered as a missing ship.

Lord Chief Justice GIBBS.—I was of opinion at the trial, that if the ship were out of time, the letter should have been communicated, but not otherwise. The letter came by a different conveyance from the ship, for it came partly by land; it was a chance therefore which would arrive first. Circumstances may make it necessary to communicate the time of a ship's sailing, but I saw none in this case.

Mr. Justice HEATH.—We cannot say, as a general rule, that the time of a ship's sailing is a necessary circumstance to be communicated.

Mr. Justice CHAMBRE and Mr. Justice DALLAS concurred, and the rule was

Refused.

1814.

GIBSON v. SERVICE (a).

Friday, April 29.

THIS action was brought on a policy of insurance, which was effected on the 20th of *May*, 1806, on the *American* ship *Washington*, at and from her arrival twenty-four hours on the coast of *Africa*, during her stay and trade there, and till the delivery of her cargo at *Charleston*, in *South Carolina*. The ship sailed from *Liverpool* on the 2d of *June*, arrived in *August* in the river *Congo*, and during her stay there, on the 9th of *August*, was taken by the *Prince of Orange*, *British* privateer, and by her carried to *Surinam*, where she was condemned. The loss was averred to have been, 1st, By unlawful seizure; 2dly, By barratry. At the trial of this cause, at the sittings after last *Hilary* term, before Lord Chief Justice *Gibbs* at *Guildhall*, it appeared in evidence that the ship *Croydon* had carried out gunpowder and muskets in concert with, and to be delivered to, the supercargo of the *Washington* (b).—Mr. Serjt. *Lens*, for the defendant, contended, that the *Washington* being thus connected with the *Croydon* in this transaction, the plaintiffs could not recover without shewing it to have been legal.

Mr. Serjt. *Best* for the plaintiffs, then insisted, that it was incumbent on the defendant to shew that the conduct of the *Croydon* was illegal, because, by the proclamation of the 11th *May*, 1803 (c), she had a right to take out powder and arms on giving the proper bonds to the commissioners of the customs; that the defendant therefore

A neutral ship meeting by agreement a *British* vessel, in order to receive prohibited goods from her, is a sufficient ground of condemnation of the neutral, though the *British* ship should have a licence to export them for the purpose of trading with them.

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(a) See the case of *Gibson v. Mair*, ante, p. 39, which was an action on the same policy.—(b) See stat. 29 *Geo.* 2. c. 16., and 33 *Geo.* 3. c. 2.—(c) *Vid. supra*, p. 40, note (b).

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should prove that these bonds had not been given: But, supposing the conduct of the *Croydon* to have been illegal, it did not follow that the *Washington* had been engaged in the transaction so as to warrant the capture. It would be a great extension of the act to say that it was to be enforced against a ship which had not, by her own misconduct, brought herself within the act.

The Chief Justice was of opinion that the plaintiffs could not support this action. He said that the legislature meant to exclude any one from exporting arms without their licence; that permission had been given to all vessels going to the coast of *Africa*, to export arms for the purpose of trading on that coast, but that it was unlawful to export arms for any other purpose; and in order that the commissioners might be certain that this was the purpose for which they were exported, bonds were required which would never be given up without a certificate of their having been so employed. In this case the goods had been carried out under pretence of trading with them on the coast of *Africa*, when in fact they were taken for the purpose of delivering them to the *Washington*. The consequence of this, if legalized, would be, that the owners of the *Washington*, or any other ship, might export any quantity of arms to *America*, without being answerable to government, or to those who might have given security for them at the custom-house. It was clear, he said, that such was the intention of these parties: This, therefore, was not the exportation for which the bonds were given. The proprietor of the arms and powder could not have maintained an action against the owner of the *Washington* for the value of them, because he was practising a fraud on this country; and if the owners of the *Washington* were aware of the illegality of this transaction and were conniving at it, it followed that the insurance must be illegal. She might have intended to have dis-

posed of the goods *bond fide* on the coast of *Africa*, but it was enough for the support of his lordship's opinion, that she had had it in her power to do otherwise.

A nonsuit was entered, with liberty to the plaintiff to move to set it aside.

Mr. Serjt. *Best*, accordingly, now moved for a rule to shew cause why the nonsuit should not be set aside and a new trial granted: The statutes, he said, had pronounced sentence only against the offending ship. In this case the question was, which was the offending ship? Certainly not both of them. In construing a penal act, the court would hardly say that the ship which carries out, and that which receives prohibited goods, are both liable. Suppose the *Washington* had been captured before her arrival in the river *Congo*; it would have been no ground of condemnation, that she had made an illegal agreement with the *Croydon*: If, then, she could not have been captured on her passage, neither was her condemnation legal after her arrival, because the offence which incurred the forfeiture was the carrying out the powder.

Lord Chief Justice *GIBBS*.—The act for which she was condemned was the carrying into execution an illegal contract.

Mr. Justice *HEATH*.—The condemnation was legal, and therefore the plaintiff was not entitled to recover.

Mr. Justice *CHAMBRE*.—This transaction was in fraud of the laws and policy of this country; the plaintiff therefore was properly nonsuited.

Mr. Justice *DALLAS*.—The agreement was completed in *England*; and it was in the *execution* of that illegal contract that this transaction took place.

Rule refused.

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Saturday,  
April 30.

ANDREW V. MOOREHOUSE.

An agreement that, in consideration that *A.* would take on board his ship *B.*'s goods, for the purpose of conveyance, *B.* would pay a certain sum on *A.*'s delivering to him the bills of lading:—Held that this is a valid contract; and that the price of the carriage of the goods is recoverable immediately on the loading them, whether the voyage be performed or not.

THIS was an action of *assumpsit*, and the first count of the declaration stated that, in consideration that the plaintiff would take on board the ship *Queen Charlotte*, belonging to the plaintiff, 42 casks of wine, to be carried from *London* to the *Cape of Good Hope*, the defendant promised to pay the plaintiff at the rate of £5 *per ton*, on delivery to the defendant of the proper bills of lading for the said casks; and averred that the plaintiff did take the said 42 casks of wine on board, to the intent that the same might be delivered as aforesaid, and did deliver proper bills of lading to the defendant for the same; and that the said ship afterwards sailed from *London*, with the said casks on board, upon the said voyage. The second count stated that, in consideration that the plaintiff would take the 42 casks of wine on board, and deliver the bills of lading, the defendant promised to pay at the rate of £5 *per ton*, when he should be thereto requested. The third count stated that, in consideration that the plaintiff, at the request of the defendant, had taken the 42 casks of wine on board, and had delivered the bills of lading to the defendant, he, the defendant, undertook to pay the plaintiff at the rate of £5 *per ton* on request. There was also a count upon a *quantum meruit* for work and labour, a common count for freight, and the money counts.

At the trial of the cause at the sittings after last *Hilary* term, before Lord Chief Justice *Gibbs*, at *Guildhall*, it appeared to have been agreed that the money should be paid, not as *freight*, in the usual acceptance of the word, where it is paid on the delivery of the goods at the port of destination, but for a sum to be paid at the time of

putting the goods on board: That there was an increase of £2 *per cent.* on a voyage from *London* to the *Cape of Good Hope*, when the money was paid on the delivery of the goods at the end of the voyage; the premium being then 7 *per cent.*, and only 5 *per cent.* when paid in *London*: It was also proved, that the defendant, on being applied to for the money, answered, that the time of credit had not then elapsed; but promised to pay it on a certain day, without reference to the ship's arrival at the *Cape*. The plaintiff admitted that the ship was lost on her voyage, off *Beachey Head*.—Mr. Serjt. *Best*, on the part of the defendant, contended, on the authority of *Masbeter v. Buller* (a), that the plaintiff must be nonsuited. In that case, the plaintiff declared that, in consideration that he had undertaken to receive the defendant's goods on board his ship, to be carried from *London* to *Lisbon*, the defendant promised to pay a sum of money on the shipment of the goods. The ship was lost in her passage; and the evidence of this alleged contract consisted in the bills of lading, some of which stated that the goods were to be delivered at *Lisbon*, *freight for the said goods being paid in London*; others stated, *on the shipper's paying freight for the said goods in London*.—Lord *Ellenborough* held that these words only meant that the freight should be paid in *London*, instead of at *Lisbon*, and that they did not dispense with the performance of the voyage; and that, if the defendant had paid the freight upon the shipment, he might have recovered it back. He also cited *Clarke* and another v. *De Druisina* (b), in which case Lord Chief Justice *Mansfield* held that the plaintiff could not support an action for freight on goods shipped in *London* for *Lisbon*, on the ground that the voyage had not been

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(a) 1 *Camp.* 84.—(b) *C. P. Sittings after Trinity*, 41 *Geo. 3. M.S.*

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performed; though the contract was, that the freight should be paid in *London*.—The *Solicitor-General* and Mr. Serjt. *Vaughan contra*, distinguished this from the case of *Masbeter v. Buller*, because in that case the contract was not, as here, that the money should be paid immediately on the delivery of the goods; the question, they said, turned merely on the bills of lading. They cited *Blakey v. Dinon (a)*, as an authority to shew that, by special agreement, the price of the carriage of goods might be made payable on their being shipped; the receiving them on board being a sufficient consideration on which to found a promise to pay immediately, though it could not be recovered by the name of freight: And it was on the authority of this case, they said, that the plaintiff had framed his declaration. This, they contended, was merely a mode of shifting the insurance from the carrier, to the consignor of the goods; and the only question in the case was for the jury's consideration, viz. whether such were the intention of the parties. The Chief Justice concurred in the opinion that this was a question for the jury, and that this case was distinguishable from that of *Masbeter v. Buller*, because in the present case, the special agreement to pay the money immediately on loading the goods, precluded the idea of the payment depending on a future event: His lordship accordingly directed a verdict for the plaintiff, with liberty to the defendant to move to set it aside.

Mr. Serjt. *Best* now moved to enter a nonsuit, contending that, though the agreement might be, that the carriage of the goods should be paid for in advance; and though there would be nothing illegal in such a contract, yet it was inconsistent with the policy of the law relating to carriers, to allow of a contract, by which the carriage of

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(a) 2 B. and P. 321.

goods should be paid for irrecoverably, whether delivered or not. The money, he said, had been paid on a consideration which had not been performed. [Lord Chief Justice *Gibbs*.—The question is, what is the consideration; your argument rests on the ambiguous meaning of the word freight.] Suppose a common carrier had been paid for the carriage of goods to *York*, and was afterwards prevented from going; certainly the money might be recovered back: It never could be said that a common carrier could shift the insurance from himself, and say that he would not be answerable for the safety of the goods. [Lord Chief Justice *Gibbs*.—Why should he not? He would cease to be a common carrier if he entered into such an engagement; but why should not I agree to carry goods from one place to another, without being answerable for their safe arrival?] He admitted that the plaintiff might have brought an action for the money, immediately on the loading of the goods; but he contended that, even if the defendant had paid it under an action, he might have recovered it back again on the failure of the voyage, on the principle laid down in *Masbeter v. Buller* above cited.

Lord Chief Justice GIBBS.—The defendant's argument has proceeded on the ground that this case is in no way distinguishable from that of *Masbeter v. Buller*, and if that were so, the court would certainly grant a rule, in order that the question might undergo a serious discussion; for though *Masbeter v. Buller* is only a *nisi prius* case, yet so respectable is the authority by which it was decided, that we should be extremely cautious of overruling it. I think, however, that that case is very distinguishable from the present. In the former, the question turned on the words of the bill of lading; I should have doubted as to the construction of those words: Lord

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*Ellenborough*, however, thought that the contract there was, that the freight should be paid at the port where the goods were shipped, not at that of their delivery; that the alteration, therefore, was only as to the place, and that the money was to be paid strictly as freight. In that case, there was no evidence to shew any intention of the parties that it should be paid before it was earned. In the present case, it was proved that the price of the carriage was 5 *per cent.* if paid here, and 7 *per cent.* if paid at the *Cape of Good Hope*. It is true, that this difference might be with respect to the *place* of payment only, on account of the difference of exchange; or it might relate to the place, and also to the time when it became due; That, however, was explained by the circumstance of the defendant, on being applied to for the money, promising to pay it on a day certain; evidently considering that a *certain* time of credit had been given. The loss happens, and the defendant refuses to pay. I left it to the jury to say what was the meaning of this contract; and they were of opinion that the money was to have been paid on the delivery of the goods in *London*.

Mr. Justice HEATH.—This was a question for the jury, and I see nothing in the verdict to find fault with.

Mr. Justice CHAMBRE.—The question was properly left to the jury, and they have properly found. The general rule of law relating to carriers, is not such as to prohibit a contract like the present.

Mr. Justice DALLAS concurred.

Rule refused.

LISLE v. BROWN.

1814.

Saturday,  
April 30.

THE plaintiff declared on the stat. 5 Geo. 3. c. 14. s. 3. (a), that the defendant, on the 29th of May 1813, at the parish of *Ellingham*, in the county of *Hants*, in a certain stream of water of the plaintiff, (not being in any park or paddock, or in any garden, orchard, or yard, adjoining or belonging to a dwelling-house, but in a certain other inclosed ground, the private property of T. C.) did, without the consent of the plaintiff, the then owner of the fishery in the said water, take &c. divers fish, without any just right or claim, &c. against the form of the statute.—The defendant pleaded not guilty.

A stream of water running by the side of a piece of ground, which is inclosed on every side, except that on which it is bounded by the water, is not a stream in inclosed ground, within the meaning of the 5 Geo. 3. c. 14. s. 3, so as to subject a person fishing therein, to the penalty inflicted by that act.

At the trial of the cause at the last *Lent* assizes for the county of *Hants*, before Mr. Justice *Bayley*, it appeared that the close, in which the stream of water was alleged in the declaration to be, was inclosed on every side, except on that towards the river; and that the ground on the opposite side of the river, though likewise inclosed, was the property of a different person: The learned judge was of opinion, that the close, being open towards the river, was not an inclosed ground within the meaning of the act, and therefore directed a nonsuit.

Mr. Serjt. *Pell* now moved to set aside this nonsuit, on the ground, that the place in question was inclosed as much as, from the nature of its situation, it could be.

Lord Chief Justice GIBBS.—The declaration states

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(a) By that section it is enacted, that, “if any person shall take, kill, or destroy, or attempt to take, &c. any fish, in any river or stream, pond, pool, or other water, (not being in any park or paddock, or in any garden, orchard, or yard, adjoining or belonging to any dwelling-house, but which shall be in any other inclosed ground, which shall be private property,) such person shall forfeit £5 for every such offence, to the owner of the fishery.”

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that the defendant took the fish in a stream "in certain" "inclosed ground, the property of *T. C.*:" How can the stream be said to be in inclosed ground, when it only runs by one side of it, forming, in fact, part of the inclosure? I agree with my brother *Bayley*, that this was not within the meaning of the act, for it was intended by the act, that land which was not secured from invasion by inclosure, should not be within the meaning of it.

The rest of the court concurred, and the rule was

Refused.

Saturday,  
 April 30.

HOLROYD, and others, assignees of *HALL*, a bankrupt, v.  
 WHITEHEAD and others.

*A.* accepts a bill payable at his banker's, to a larger amount than his effects in their hands, which is there paid. Afterwards, having committed an act of bankruptcy, he repays them the balance:—Held that this was a payment in fraud of the bankrupt laws, and not protected by stat. 19 Geo. 2. c. 32. s. 1.

THIS action was brought by the assignees of *Isaac Hall*, a bankrupt, to recover the sum of £250, as money had and received by the defendants to the use of the bankrupt. At the trial of the cause at *Guildhall*, at the sittings after last *Hilary* term, before Lord Chief Justice *Gibbs*, it appeared that the defendants were bankers, and that the bankrupt had been accustomed to keep an account with them, and to accept bills payable at their house.—One of these bills, to the amount of £300, having been so accepted by the bankrupt, became due on *Saturday* the 8th of *August*, 1812, was presented at the house of the defendants, and by them paid.—On referring to the banking book, it appeared that the bankrupt had at that time only £50 in the defendant's hands, so that by the payment of this bill the latter became £250 in advance to the bankrupt; in consequence of which, on the *Monday* following, *Hall*, having in the meantime committed an act of bankruptcy, sent £150 to the defendants.

The *Solicitor-General*, for the defendants, contended that this payment was protected by the stat. 19 Geo. 2. c. 32. s. 1. (a), and that therefore the defendants were intitled to retain the money so paid. The Chief Justice, however, was of a contrary opinion, and the jury found their verdict for the plaintiffs.

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 v.  
 WHITEHEAD.

The *Solicitor-General* now moved that this verdict should be set aside, and a new trial granted, on the point made by him at the trial.—The defendants, he said, had paid the bill without any knowledge of the bankruptcy, and this was in fact a payment by them, on what was tantamount to a bill of exchange, drawn on them by the bankrupt; for he contended, that if the bankrupt had drawn a draft on the defendants, that would have been a payment specifically within the statute; and in the present case, the acceptance payable at the defendant's house, was in fact a draft on them.

Lord Chief Justice GIBBS.—If it had been a draft on the defendants, they could not have declared upon it according to this act, for banker's drafts are not mentioned in it: Nor could they have brought their action against the bankrupt, in the character of holders of the bill; for if a man draw a bill on me, and I pay it, I cannot sue him

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(a) That section, after reciting "that many persons within the description of, and liable to the statutes of, bankrupts, frequently commit secret acts of bankruptcy, unknown to their creditors; after which they continue to appear publicly, and carry on trade, by buying and selling goods, drawing, accepting, and negotiating bills of exchange, and paying and receiving money on account thereof, in the same open manner as if they were solvent persons;" enacts, "that no person who is really and *bonâ fide* a creditor of any bankrupt, in respect of goods really and *bonâ fide* sold to the bankrupt, or of any bill of exchange really and *bonâ fide* drawn, negotiated, or accepted by him, in the usual course of trade, shall be liable to the assignees of such bankrupt for any money, which, before the commission sued out, was really and *bonâ fide* received by him of such bankrupt, before notice to him of the bankruptcy or insolvency."



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afterwards as bearer of it : So, if one of several obligors of a bond pay the bond, he cannot put it in suit against his co-obligors.—The bill, or bond, being once paid, is *functus officio*, and there is an end of the instrument. This case, in effect, is merely that the bankrupt, having overdrawn himself, paid back the balance ; and it is no more than if the bankrupt had borrowed the sum of £250 of the defendants. It is impossible that this payment can be taken to be within the meaning of the act, which is confined to the case of goods sold to the bankrupt, and to that of bills of exchange, where the bankrupt is liable on the face of the instrument, and where the other party could have sued upon it.

The rest of the court concurred, and the rule was  
 Discharged.

Saturday,  
 April 30.

LIVESEY and others v. WILLIS,

*A.* deposits goods with *B.* for sale, and then assigns his property to trustees for his creditors ; the trustees, at *B.*'s request, pay the duties on the goods, which, when sold, do not produce sufficient to repay them :—Held that the trustees are entitled to recover the money advanced by them, together with the proceeds of the goods ; though *A.* had before the assignment, agreed that they should go in liquidation of a claim which *B.* had upon him.

THIS was an action on the money counts, to which the defendant pleaded the general issue, and gave notice of set off.—At the trial of the cause, at the sittings after last *Hilary* term, before Lord Chief Justice *Gibbs* at *Guildhall*, it appeared that *T.* and *S. Sproston*, who were merchants in *London*, had deposited a quantity of barilla in the defendant's hands, as a broker, for sale ; and it was accordingly entered in the defendant's name at the docks. The *Sprastons*, being at this time in distressed circumstances, on the 2d of *July* following assigned all their property to the plaintiffs, in trust for the benefit of their creditors. After the assignment had taken place, the defendant applied to the plaintiffs for £105, being the amount of the duties on the barilla ; and he stated, that he had entered

into an agreement for the sale of it, by which there would remain a considerable surplus, after repaying the money which the plaintiffs should advance.—The plaintiffs accordingly paid the £105; but the barilla turned out to be so much deteriorated, that the purchase which had been agreed upon was never completed, and the produce of it, when sold, was not sufficient to repay them the amount of the duties. This action was therefore brought to recover the sum advanced by them, together with the proceeds of the barilla, which the defendant contended he had a lien upon, for a debt due to him from the *Sprostons*, and which, it appeared, the *Sprostons* had, before the assignment, agreed should go in liquidation of his claim.—Mr. Serjt. *Vaughan*, for the defendant, contended that the trustees could not stand in a better situation than the *Sprostons* themselves; and that their title to the barilla was subject to all the claims to which the barilla was liable before the assignment.—The Chief Justice, however, said that the effect of what the defendant contended for would be, that the plaintiffs, as assignees, would be paying the debt due to the defendant in preference to those of the other creditors, for whose satisfaction, in general, the property had been assigned.—Mr. Serjt. *Vaughan* then attempted to set off against the plaintiff's claim of £105, a bill of exchange, which the defendant had accepted to that amount, for the accommodation of the *Sprostons*; but the Chief Justice, considering this as liable to the same objection, of giving an undue preference to the defendant's debt, directed a verdict for the plaintiff.

Mr. Serjt. *Vaughan* now moved to set this verdict aside, on the same grounds which he had insisted upon at the trial; viz. that as the *Sprostons* could not have recovered back this money, their assignees, who, he contended,

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were not to be placed in a better situation, were not entitled to it.

Lord Chief Justice GIBBS.—My view of the case is, that if the *Sproston*s had paid the money, they certainly could not have recovered it back: The assignees, however, stand in a different situation, because they were trustees for the creditors in general; and as such, they were to consider whether they were benefiting the estate by facilitating the sale of the barilla;—they were informed, that it would produce sufficient to pay the money which they should advance, and leave a surplus to go towards the satisfaction of the creditors. It turned out, however, that the contract, into which the defendant said he had entered for the sale of the barilla, was never completed; consequently the consideration on which the plaintiffs had paid the money, failed: I am therefore of opinion, that the plaintiffs were entitled to recover.

The rest of the court concurred.

Rule refused.

Saturday,
 April 30.

PINTO v. SANTOS and others.

A. having received money as agent for *B.* and others, in specific proportions for each, pays it over to *C.* as a banker in his own name, and having drawn out part of it, directs *C.* not to

THE plaintiff in this action, *Antonio da Costa Pinto*, was a Portuguese merchant, residing at *Rio Janeiro*, and was owner of the ship *Nostra Senora di Livramento*, which was captured in the year 1801 by a British ship of war, and condemned. On hearing of the capture, the plaintiff sent his brother *Manuel*, who was captain of the vessel, as his agent, to *England*, to appeal against the condemnation.

pay away the remainder, except by his order:—Held that *C.* is bound to hold the money for *A.*, and that therefore *B.* cannot recover the remainder of his share from *C.*; though he had given *C.* notice that *A.*'s agency was at an end.

—The appeal was prosecuted with success, and *Manuel* received under the judgment of the court of admiralty, as damages for the illegal capture, different sums of money, proportioned to the respective claims of the plaintiff, as owner of the ship, and of other persons, as proprietors of the cargo; which sums, so apportioned, he paid into the hands of *Caetano Dias Santos*, who was a *Spanish* merchant residing in *London*, in his own name. *Manuel*, having drawn out several sums of this money, afterwards left this country, previously giving directions to *Santos*, to pay none of the residue away except by his order.—On some disagreement which arose between the plaintiff and his brother, the former gave notice to *Santos*, not to pay over any more of his money to *Manuel*. *Santos*, however, considered himself bound to hold it on account of *Manuel* only; and having died, this action was brought against his executors for the balance of the plaintiff's share, remaining in their hands; the plaintiff admitting the sums which had been paid to *Manuel*, before the notice was given.

At the trial of the cause at the sittings after last *Hilary* term, at *Guildhall*, before Lord Chief Justice *Gibbs*, the *Solicitor-General* for the defendants, contended that though the money, which had been paid into the hands of the testator, had been, by the decree of the court of admiralty, specifically appropriated to the use of the different claimants; yet, as it had been paid to *Santos* on one general account, he would not be authorised in appropriating any part of it to the use of any particular person, without an express authority from the person from whom he received it.—He compared this to the case of a person collecting rents for different persons, and paying the gross amount into the hands of a banker;—such banker, he contended, would not be liable to each of those persons for his distinct share. The plaintiff's proper remedy, he said, was against his brother *Manuel*.

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—Mr. Serjt. *Best*, *contra*, insisted that when a man, who receives money through the agency of a third person, is told that he must no longer consider that person as agent, he has no right to say that he will continue to hold the money for the agent, and not for the principal.—The Chief Justice, however, was of opinion, that the action could not be supported, and accordingly directed a verdict for the defendants.

Mr. Serjt. *Best* now moved, that this verdict should be set aside, and a new trial granted. This case, he said, was not to be considered as a common case of agent and principal, because the agency had been expressly countermanded; and as *Santos* knew that the money was not the property of the person who put it into his hands, when he received notice that *Manuel's* authority was at an end, he had no longer any right to pay it to him, but ought to have considered himself as holding it for the plaintiff only. He might have known the proportions of each claimant by the decree of the court of *Admiralty*. Suppose *Manuel* had lodged goods instead of money, in the hands of *Santos*; certainly they could not have been detained after *Manuel's* agency had ceased, but they must have been delivered over to the principal; and there was no distinction, he said, between the case of money and of goods.

Lord Chief Justice GIBBS (after stating the circumstances of the case).—I think the plaintiff cannot separate his claim from that of the other persons concerned. This is not like the case of a man paying money, the whole of which belongs to one person: *Santos* received this money on account of *Manuel* only, and *Manuel* very probably told him to hold it only on his account; the money was to be distributed by *Manuel* among the different claimants; but it was impossible for *Santos* to take notice of the transactions between *Manuel* and those persons. He might have been aware that *Manuel* was

only an agent; he might even have known the exact shares of each claimant; but he could not know how much of the money which had been paid out, was paid over to the plaintiff; and if he had complied with the plaintiff's demand, the other persons, on whose account, together with the plaintiff, it was paid in, would have had the same right to come upon him for their shares.

The rest of the court were of the same opinion.

Rule refused.

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SANTOS,

JACOB v. KING.

Monday, May 2.

In this cause, which was an action of replevin, the *Solicitor-General* moved that the proceedings, which had been removed into this court, should be set aside: The goods, he said, had been distrained, and had remained undisposed of for five days; at the end of that time they were removed and appraised, but not sold; and he contended, that by stat. 2 *W. and M. sess. 1. c. 5. s. 1. (a)*, the plaintiff had no right to replevy after the five days were elapsed, and the goods appraised.

Where goods are distrained, and at the end of five days appraised, but not sold, the act of appraisement does not take away the plaintiff's right to replevy them.

The court, however, were of opinion that the goods were still a distress until sold, and that therefore the act of appraisement did not destroy the right to replevy. At common law, goods might have been replevied at any

(a) By that section it is enacted, "that where any goods shall be distrained for rent, and the owner of such goods shall not *within five days after the distress taken*, and notice thereof, replevy the same, giving security to the sheriff; the person distraining shall and may cause the goods so distrained to be appraised; and after such appraisement shall and may sell them for the best price, towards satisfaction of the rent, &c."

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time ; and as there were no words in the statute to negative the right of replevying, unless the goods were actually sold, they considered there was no ground for the application, and

Refused the rule.

Monday, May 2.

REDMAN v. LOUDON.

In a policy of insurance at and from *London* to *Berbice*, after the clause "beginning the adventure, &c.," are inserted the words "at sea;" and at the bottom of the policy, the words "on ship." The ship, without express leave so to do, stops at *Madeira*, by which means she loses her convoy, and is captured on her way from thence to *Berbice*:—Held that the insertion of the above words does not imply that the risk commenced at sea, so as to justify the deviation; though at the time of effecting the insurance, the underwriters were informed that the ship had been at *Madeira*.

THIS was an action on a policy of insurance, which was effected on the 8th of *January*, 1813, on the ship *Sir Sidney Smith*, at and from *London* to *Berbice*, with liberty to proceed and sail to, and touch and stay at any ports or places whatsoever, especially to join and sail with convoy. The policy had all the usual printed words left standing; but after the clause "beginning the adventure upon the said goods and merchandise, from the loading thereof on board the said ship," the words "at sea" were inserted, and at the bottom of the policy, the words "on ship" were written.—At the trial of the cause at *Guildhall*, at the sittings after last *Michaelmas* term, before Lord Chief Justice *Mansfield*, it appeared that the ship had sailed from *Portsmouth* on the 25th of *September* 1812, arrived at *Madeira* on the 17th of *October* with convoy; and remained there so long, employed in taking in goods, that she lost the convoy. She was afterwards, on the 19th of *November*, captured in her way from *Madeira* to *Berbice*, by the *Americans*, and foundered while in possession of the captors. The agent who effected the policy stated, that, at the time of effecting it, he had in his hand a letter from the captain to his owners, dated the 7th of *November* 1812, at sea, which he shewed to the under-

writers, and which stated that the ships, in company with which he had expected to sail from *Madeira*, had sailed without him, and that he should the next day part from the two vessels which then accompanied him, and should then proceed alone.

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Mr. Serjt. *Best*, for the defendant, objected that the voyage being described in the policy as from *London* to *Berbice*, without any express liberty to touch at *Madeira*, which was out of the regular course of the voyage, the ship had, by going thither without absolute necessity, been guilty of a deviation which avoided the policy.—The *Solicitor-General*, *contra*, insisted that this was not an insurance from *London* to *Berbice*, but that the policy only attached when the ship was *at sea*; and therefore that any previous deviation was immaterial. Lord Chief Justice *Mansfield*, however, after observing that it was a very absurd and unmeaning policy, directed a nonsuit.

The *Solicitor-General*, in *Hilary* term last, moved to set aside this nonsuit. He admitted that, in general, this would have been a deviation, but contended that, though the common words of course were all left in the policy, yet the words “*at sea*,” coupled with the words “*on ship*,” must be taken to mean that the ship was at sea at the time when the policy attached; though it certainly was an awkward way of expressing that meaning. The only way, he said, by which the underwriter could avail himself of this circumstance, was by alleging that there had been an increase of risk, since he signed the policy; but he was precluded from making that objection, by his having previously seen the letter which stated the ship to have been at *Madeira*. A rule *nisi* was accordingly granted.

Mr. Serjt. *Best* now shewed cause, and contended, that there was nothing in the words which had been inserted, which could be said to control the policy in its general



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form. If they had any meaning, it was only an intimation to the underwriters that the ship, in point of fact, was at sea, that they might not afterwards object that she had sailed; but it was difficult, he said, to put any construction whatever upon them. The original words of the policy made a clear and intelligible contract, to insure at and from *London to Berbice*, and this express agreement was not to be got rid of by words of doubtful, or of no meaning. Suppose the ship had been lost between *London* and *Madeira*, could the underwriters have set up as a defence, that the policy did not attach till the ship was at sea? The proper mode of construing an instrument of this kind, he said, was by reconciling all its parts. There was nothing in the policy to shew that the underwriters knew of the ship's having been at *Madeira*. He concluded by insisting that this was strictly a policy from *London to Berbice*, and that, therefore, any deviation after leaving *London* discharged the underwriters.

The *Solicitor-General*, *contra*, admitted that this was a deviation from the regular course of the voyage, but contended, as before, that the words which had been inserted, so controlled the general effect of the policy, as to make the risk commence at sea. [Lord Chief Justice *Gibbs*.—At what point of the voyage would you suppose the risk to have commenced? The court has every disposition to assist you, because the underwriters had seen the letter.] The *Solicitor-General* then contended that, even supposing the policy to have attached at *London*, and not at sea yet the underwriters, having signed the policy, after the previous deviation had been communicated to them, had consented to that deviation, and had waived their right to set it up as a defence.

Lord Chief Justice *GIBBS*.—You should have shaped your contract accordingly. The contract in its present form is to indemnify the plaintiff in a voyage from *London*

to *Berbice*, and that voyage should have been performed as the law requires. In the school of morality, your argument would be irresistible, but we are not here on the honesty of the case. I fear you cannot support your motion.

The rest of the court concurring in the opinion of the Chief Justice, the rule was

Discharged.

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MEREST v. HARVEY.

Monday, May 2.

THIS was an action of trespass for breaking and entering the plaintiff's closes, in the county of *Norfolk*, and with dogs and guns beating and hunting for game. The defendant, previously to the last assizes, obtained leave of the court to withdraw his plea, and suffer judgment to go by default, the damages to be assessed before the judge of assize; and they were accordingly assessed before Mr. Justice *Heath*, at the last assizes holden at *Thetford*, to the amount of £500, being the extent of the damages laid in the declaration.

In trespass for breaking and entering the plaintiff's closes, and sporting there, under circumstances of aggravation, the jury gave 500*l.* damages.—The court refused to reduce them, though the plaintiff had sustained no actual pecuniary damage.

Mr. Serjt. *Blosset* now moved for a rule to shew cause, why the verdict should not be set aside and a new trial granted, on the ground of excessive damages. Mr. Justice *Heath* then stated the circumstances of the case, which were briefly that the defendant, who was a magistrate, had committed the trespass before the plaintiff's face, in defiance of the plaintiff's notice that he was a trespasser, and accompanying the injury by every kind of insult and aggravation.

Lord Chief Justice GIBBS.—When a man disregards the conduct and principles of a gentleman and of a ma-

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gistrate, what is to prevent the repetition of such conduct, but large damages? What should we say to a man in an inferior station of life, who should so conduct himself? I know not on what principle we could grant a rule in this case, except on the ground that the jury should only have found to the extent of the actual pecuniary damage sustained by the plaintiff. Suppose I had a walk before my house, which I had a pleasure in looking at, or in walking upon, would it be allowed that a man should come and walk there to my annoyance, and then offer me a halfpenny in satisfaction, alleging that I had received no actual damage? This is a much stronger case, for no conduct could have been more outrageous, than that of the defendant on this occasion.

Mr. Justice HEATH.—I left it to the jury to say what damages would be a proper compensation, and it never can be contended that these were too much. I remember a case many years ago, where the jury gave £500 for merely throwing off a man's hat, and the court refused to set aside the verdict.

*Per Curiam,*

Rule refused.

Tuesday, May 3.

TITTERTON v. CONTERS.

A window frame erected on a party-wall, held not to be a common nuisance within the 14 Geo. 3. c. 78, so

THIS action was brought against the defendant for obstructing the plaintiff's ancient lights, and was tried before Mr. Justice Dallas, at the sittings after last Michaelmas term, at Guildhall, when, the obstruction being clearly as to deprive the owner of it of his right to the windows, which were proved to be ancient lights; and if it were, that it would not, without conviction, be an answer to an action for obstructing them.

proved, the learned judge directed a verdict for the plaintiff, reserving for the consideration of the court the question, whether under the building act, 14 *Geo.* 3. c. 78, the plaintiff were entitled to the windows in question. The plaintiff's house and that of the defendant adjoined each other, having each of them a yard behind, separated from the other by a wall. Both the yards were covered over, so as to form, on the defendant's side, a sort of shed; and on the plaintiff's side, a workshop erected against the wall, in which were windows which overlooked the defendant's shed, and which the plaintiff proved had been enjoyed by him for upwards of 30 years. This was the relative situation of the two houses in *January* 1803, when the plaintiff pulled down his workshop; and the wall which separated the yards being at the same time condemned by the district surveyor, under the building act, it was pulled down, and the plaintiff rebuilt it, half on his own ground and half on that of the defendant, who bore his share of the expence, making it strictly a party-wall according to the act. Having raised it to the height of the old wall, the plaintiff inserted on his own half of it a frame-work composed of slate and wood, containing windows in the same position as those in the old workshop, and carried it up in a slanting direction from the wall, but making a more obtuse angle with the wall, than a slanting roof generally makes; he then covered the building in at the top, so as to form a complete story. In *July* 1813, the defendant rebuilt his shed, and in so doing raised the roof so high as to cause the obstruction complained of.

Mr. Serjt. *Best* and Mr. Serjt. *Vaughan*, in *Hilary* term, obtained a rule *nisi* to set aside the verdict and enter a nonsuit, contending that the windows, having been made in a party-wall contrary to the building act, were a common nuisance, and, therefore, that the plaintiff

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could not maintain an action for the obstruction of them: They relied principally on the 14th, 26th, 27th, 42d, and 60th sections of the act (a).

The *Solicitor-General* now shewed cause, and contended, *first*, that the windows in question were not contrary to the building act; and *secondly*, that if they were, that would be no answer to the present action. As to the *first* point, he insisted that the frame in which the windows were placed, could not be considered as a continuation of the party-wall, but was in fact a roof erected on the plaintiff's half of the wall; and this, he said, was a complete answer to the 14th, 26th, 27th, and 42d sections of the act, which only related to party-walls. It had been proved that the windows in question were ancient lights; it was certain, therefore, that the defendant would not have been entitled to obstruct them, if the wall had been built entirely on the defendant's ground;

(a) The 14th section enacts, "that all houses which have not each a distinct wall, shall have party-walls between each other, built of brick and stone, except such wood, lead, or iron work, as by the act is directed, or as may be necessary for the foundation thereof; half on the ground belonging to one house, and half on that belonging to the other."

The 26th section enacts, "that every party-wall shall be 18 inches above the roof of any building which shall gable against or adjoin such party-wall, and that there shall be no opening in such wall, except for communication from one warehouse, or one stable, to another, and except necessary passages on the ground."

The 27th section directs, "that no timbers shall be laid into any party-wall, except such *templets*, *chains*, and *bond-timbers*, as shall be necessary for the same."

By the 42d section it is enacted, "that every party-wall, and every addition thereto, shall be built agreeably to the directions in the act contained; and that no party-wall shall be raised, after the building is completed, unless it can be done with safety to itself, and to the adjoining buildings; but if it can be done with safety, may be raised by the proprietor of any adjoining building, to any height he shall think proper."

The 60th section enacts, "that if any person be convicted of building or altering any house or wall, contrary to the directions of the act, such house or wall shall be deemed a common nuisance, &c."

neither, he contended, could he carry up a party wall, so as to produce that effect. It never could have been the meaning of the act, that a party-wall might be carried up to any height, without regard to the injury which might be done to the neighbours. The right therefore of raising it, as granted by the 42d section, was only a privilege to be exercised on condition of not infringing the rights of others. But *secondly*, even if this erection were contrary to the directions of the act, he contended that, as by the 60th section it was necessary that the person disobeying the regulations of the act should be convicted of so doing before the building could be considered as a common nuisance, and as there had been no conviction in the present case, the supposed disobedience could not be set up as an answer to this action.

Mr. Serjt. *Best* and Mr. Serjt. *Vaughan*, *contra*, contended, that if the plaintiff were to establish his right to build up the wall as he had done, the effect of the act would be entirely destroyed, and there would be an end to all the security intended to be afforded by party walls: For supposing there had been no windows in this building, but the plaintiff had merely carried it up by inserting the timbers into the wall; the defendant would have had an equal right to do the same on his side, in which case there would have been two buildings running up close to each other, without the security of a party-wall, which the 14th section expressly provided against. Supposing this not to be a continuation of the party-wall, it was then directly in the teeth of the 26th section; for they denied that this could be considered as a roof; and then, instead of the party-wall standing eighteen inches above any adjoining building, this erection was considerably higher than the wall itself. The 27th section, they said, was equally evaded, since the beams which had been laid into this wall, could not be said to be for any of the pur-

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poses mentioned in that section. The 42d section enacted, that no party-wall should be raised, unless it could be done with safety to the adjoining buildings; the meaning of safety was, that no timbers should meet together from different houses above the party-wall; whereas, if the defendant had chosen to build up the wall on his side, in a way similar to the plaintiff, there would have been two wooden frames almost touching each other. But supposing the building to remain as it was, the defendant would not have that protection against fire, which the act meant to afford; for in case of fire, there would be nothing to prevent the burning rafters falling from the plaintiff's building on the defendant's roof. It was no answer to this objection, that the plaintiff had had a wall with windows in it in the same situation, before the present wall was built. The plaintiff, having availed himself of the act, to build the new wall partly on the defendant's ground, and to call on the defendant to bear half the expence, had brought himself within the other regulations of it. He might perhaps have had a right to the windows in the original wall, but the moment it became a party-wall, that right was destroyed, and he could no longer complain of any obstruction to them. As to the second question, whether this were an answer to the action, they contended that conviction was not necessary to establish this a common nuisance; the offence existed independently of the conviction, which was only necessary for the purpose of *pulling down* a house or wall, which should be illegally built. It never could be contended that the plaintiff could recover damages for the obstruction one day, and on the next be convicted and have his house pulled down, for those very windows which were the subject of the action. When the law had said that a thing should not exist, no action could be supported for any injury done to that thing; for that

would be converting the violation of the law into a right of action.

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Lord Chief Justice GIBBS.—This action is brought for obstructing lights, which the plaintiff insists he is entitled to, founding his claim on proof of his having enjoyed them for upwards of 30 years, which is certainly *prima facie* evidence of the right. There is no doubt but the defendant raised the building which has obstructed the windows, but he endeavours to justify himself in so doing by saying that the building in which the lights were, had been raised in defiance of the building act, and that, therefore, the plaintiff had forfeited his right to enjoy them. I am clearly of opinion that the act does not in any way affect his right to the windows in question. The defendant then objects that the plaintiff waived his right by carrying the wall into his neighbour's ground, thereby making it subject to the regulations imposed by the act upon party-walls. It is a sufficient answer to that objection, that the plaintiff was obliged by the act to make it a party-wall, and whether he were justified in making the addition to it which he has made, or no, is no defence to this action. This is not a complaint against the plaintiff for illegally constructing his building, but it is an action against the defendant for obstructing that to which the plaintiff claims a right, and to which he has shewn that he has a good title. If the plaintiff have violated the act, the defendant should pursue the course required by that act.

Mr. Justice HEATH.—I am of the same opinion : It is contended that this building was a common nuisance, and that therefore the defendant was justified in obstructing the windows of it. According to that argument, he might have proceeded at once to pull it down : If he have any remedy, let him pursue it.

Mr. Justice CHAMBER concurred.



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Mr. Justice DALLAS.—Perhaps the requisites of the building act have not been strictly complied with on the part of the plaintiff; but the defendant's remedy is under that act.

Rule discharged.

Tuesday, May 3. BELL and others v. KYMRE, M'TAGGART, and others.

The indorsee of a bill of lading, which directs the goods to be delivered *to order or to assigns, paying freight*, is liable for the freight, though he be only acting as broker for the consignee; and though twelve months have elapsed since the landing of the goods, without any demand of freight, he is bound not to deliver the goods till he knows that freight has been paid.

THIS was an action brought by the charterers of the ship *Hind*, to recover the sum of £1152 : 12s : 3d, being the amount of freight due for the carriage of a quantity of coffee, from the island of *St. Domingo* to *London*. The bill of lading, dated the 6th of *June*, 1809, directed the coffee to be delivered at *London, to order or to assigns, paying freight for the said goods as per charter-party*, and was indorsed by the consignor to *Thomas Goodall*, who indorsed it over to *William Fletcher*. On the ship's arrival in *London*, in *August*, 1809, *Fletcher* applied to the defendants, as brokers, to dispose of the coffee, and indorsed the bill of lading to them for that purpose. The coffee was landed at the *West India* docks, and was entered there in the name of the defendants, who advanced £4,000 upon it. It was afterwards sold by them at different times, and in *May*, 1810, they paid over the balance remaining in their hands to *Fletcher*. On the 5th of *August* following, the plaintiffs, for the first time, delivered a freight-note, and applied to the defendants for payment; they refused, on the ground that the demand should have been made sooner, and while the proceeds of the coffee were still in their hands; in consequence of which refusal, the present action was brought. The cause was tried

before the late Lord Chief Justice *Mansfield*, at *Guildhall*, at the sittings after last *Michaelmas* term, when a verdict was found for the plaintiff on the authority of *Cock v. Taylor* (a), where the court held, on a bill of lading similar to the present, that the demanding and taking the goods from the master of the ship, by the purchaser and assignee of the bill of lading, was evidence of a contract by such purchaser to pay the freight. *Wilson v. Kymer* (b) was also alluded to, in which the circumstances were similar to those of the present case, except that the defendants had obtained delivery of the goods under an order from the consignees, and not under the bill of lading:—The court held that this delivery raised no implied *assumpsit* to pay the freight, unless, as appeared to be the case, the defendants had been accustomed to pay the freight on the receipt of the goods, deducting it afterwards from the proceeds.

The *Solicitor-General*, in *Hilary* term, obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial granted:—He contended that, as it was the custom to deliver the freight-note within two months after landing the goods, and as, in the present case, there had been no demand of freight for nearly twelve months afterwards, when the defendants had paid over the proceeds to their employers, the plaintiffs were not entitled to recover. The case of *Cock v. Taylor*, he said, only established the general proposition, that the purchaser of the cargo is liable for the payment of the freight; in the present case, the defendants were only acting as agents for the consignees. He also objected that where there was a charter-party, there could be no implied *assumpsit* upon a bill of lading; and said there

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(a) 13 *East*, 399.—(b) 1 *M. and S.* 157.

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was a case then before the court of *King's Bench*, in which that question had been made.

Mr. Serjt. *Lens* now shewed cause against the rule, and contended that the time which had elapsed between the delivery of the goods, and the demand of freight, made no difference in the case. If the defendants were liable in the first instance, their liability remained, notwithstanding the delay. The only question, therefore, was, whether this case fell within the principle of *Cock v. Taylor*, or of *Wilson v. Kymer*. He contended that it came strictly within that of the former case; for the goods had been delivered to the defendants, they claiming them as their right, as indorsees of the bill of lading: It was not, therefore, a delivery under a special order or memorandum, as in the case of *Wilson v. Kymer*. The relative situation of the party holding the bill of lading, as to his interest in the goods, made no difference with regard to the person claiming freight.

The *Solicitor-General*, being called upon by the court to distinguish this from the case of *Cock v. Taylor*, said, that in that case the goods had been delivered from on board the ship to the indorsee of the bill; and he admitted that when the consignee or purchaser of a cargo applies to the master of the vessel for the delivery of the goods, he has no right to suppose that freight has been paid; and therefore the implied promise to pay it is raised in him. But in the present case, the goods had been landed at the docks, where the custom was, in case the freight be not paid, to put a *stop* upon the goods, that is, an order not to deliver them till the freight be paid: If that had been done here, the present case would have fallen within the principle of *Cock v. Taylor*; but no such stop had been put, nor any notice given to the defendants that freight was due; how then could they, being mere agents, be considered as liable? He then insisted that the plaintiffs,

by their delay in making their demand, had forfeited their claim, if any existed, upon the defendants: They should have applied while the defendants had funds in their hands, sufficient to answer their demand. Unless, therefore, the court should be of opinion that the holder of a bill of lading, whatever be the length of time between the delivery of the goods and the demand of freight, had no right to pay over the proceeds, without first ascertaining that the freight had been paid, the present verdict could not be supported.

Lord Chief Justice GIBBS.—The holders of the bill of lading were bound to know that they were liable for the freight; and therefore should not have paid over the proceeds, without first taking care that their employers had paid it. The present defendants are the last persons in the world who should plead ignorance, because it appears from the case of *Wilson v. Kymer*, that it was their practice to pay the freight on the receipt of the goods. I think it is impossible to distinguish this from the case of *Cock v. Taylor*.

The rest of the court concurred.

Rule discharged

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LAMBERT v. LIDDARD.

Tuesday, May 3.

THIS was an action on a policy of insurance, which was effected on the ship *Lion* and freight, at and from *Pernambuco*, or any other port or ports in the *Brazils*, to *London*; "beginning the adventure from the loading the goods on board the ship, on the termination of her cruize, and preparing for her voyage to *London*;" The ship, on the termination of her cruize, touched at *Pernambuco*; but failing to procure a cargo there, she proceeded for *St. Salvador*, and was lost on her voyage thither:—Held, 1, that the policy attached at *Pernambuco*; 2, that the ship's proceeding for *St. Salvador* was no deviation; and 3, that the voyage was well described in the declaration, as from *Pernambuco* to *London*.

On a policy at and from *Pernambuco*, or any other port or ports in the *Brazils*, to

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*London*; “beginning the adventure upon the said goods “and merchandize, from the loading thereof on board the “said ship, upon the said ship, &c. on the termination of “her cruize, and preparing for her voyage to *London*; “with or without letters of marque, with leave to chase, “capture, man prizes, and see them into port; but not to “cruize.” The first count of the declaration stated that on the 20th of *August*, 1813, the cruize terminated, and the ship then prepared for, and departed and set sail upon, the said voyage to *London*, from parts beyond the seas, to wit, from *Pernambuco* aforesaid; and that afterwards, and while she was proceeding on her voyage, and before her arrival at *London*, to wit, on the 20th of *September*, the ship was lost. The second count stated that on the 20th *August*, 1813, the cruize terminated, and that the ship was then in good safety, and preparing for her voyage to *London* aforesaid; and that afterwards, and while she was sailing and proceeding on her said voyage towards *London*, to wit, on the day and year last aforesaid, the ship was lost. The cause was tried before Lord Chief Justice *Mansfield*, at the sittings after last *Michaelmas* term, when it was proved by the captain of the ship, that her cruize ended on the 18th of *June*, 1813; that his object then was to get a cargo; that he went to *Pernambuco*, as the nearest port for that purpose; that he sent an officer on shore to see if a cargo could be procured, but finding that none was to be had, he took in some stores and proceeded for *St. Salvador*, another port in the *Brazils*, and the nearest to *Pernambuco*; and that before she reached *St. Salvador*, the loss happened. He also stated that, could he have got a cargo at *Pernambuco*, he should have come direct from thence to *London*. *St. Salvador* is four or five hundred miles from *Pernambuco*, and in an opposite direction to *London*; being to the south of *Pernambuco*; *London* to the north. On this evidence, a

verdict was found for the plaintiffs for the amount of the loss on the ship, with liberty to the defendant to move to enter a nonsuit on three grounds: *First*, that the risk had not attached when the loss happened; *Secondly*, that the going from *Pernambuco* to *St. Salvador* was a deviation; *Thirdly*, that the voyage was not described in the declaration, so as to meet the evidence: And Mr. Serjt. *Vaughan* accordingly obtained a rule *nisi* in *Hilary* term.

The *Solicitor-General* and Mr. Serjt. *Best* on this day shewed cause, and premised that there were three special qualities in the policy; *first*, that it should commence at the termination of the cruize, *secondly*, that the ship might carry letters of marque, and *thirdly*, that she had leave to take in goods at any port or ports in the *Brazils*. As to the *first* objection, they contended that the ship having been insured at and from *Pernambuco*, or any other port or ports in the *Brazils*, the meaning of the policy was that she should be at liberty to go to any, and any number, of ports on that coast, till she had completed her cargo; and that at the first port at which she should touch, whatever that might be, the policy should attach; and the attaching of the policy could not be affected by any subsequent deviation. The cruize had ended at *Pernambuco*, and the ship having become a trading ship, the policy attached there. As to the *second* objection, that the going to *St. Salvador* was a deviation, they contended that by the words of the policy, the ship had a right to go to any number of ports in the *Brazils*, and in any order, though not in her direct course to *London*, provided she kept the purpose of her voyage in view, viz. the procuring a cargo to bring to *London*. They said this was the same case, as if the policy had been from *Pernambuco* to *London*, with liberty to go to *St. Salvador*. In order to support the defendant's proposition, that, having made her election of her port of loading, the ship

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could not afterwards go to any other port, unless in her direct course to *London*, the words should have been "at and from *Pernambuco* and no other port," instead of "at and from *Pernambuco* and any other port or ports." As long, therefore, as the ship remained on the coast of *Brazil*, she was under no limitation as to the ports she went to. They compared this to the case of *Bragg v. Anderson* (a), where the court held that a policy, at and from *Martinique* and all or any of the *West India* islands to *London*, warranted the ship in touching at *St. Domingo*, though that island was considerably out of her direct course from *Martinique* to *London*. As to the last objection, that the voyage was not described in the declaration so as to meet the evidence, they said this was in fact a question on the merits, and depended on the second point which had been reserved; for if the ship had a right to go to *St. Salvador* for the purpose of getting a cargo for *London*, the voyage was well stated as from *Pernambuco* to *London*: At all events, the second count was correct, in averring that the ship was proceeding *towards London*.


Mr. Serjt. *Lens*, Mr. Serjt. *Vaughan*, and Mr. Serjt. *Copley*, *contra*, contended *first*, that the risk had not attached when the loss happened, because the policy being in the terms above stated, it was necessary to shew not only that the cruise had terminated, but that she was preparing for her voyage to *London*; for which purpose she should have arrived at her port of loading, and unless she had so arrived, the risk did not attach; the fact appeared to be, that she had only touched at *Pernambuco*, and then sailed for *St. Salvador*. But *secondly*, if the risk had attached, they contended that the ship had clearly been guilty of a deviation; for supposing *Pernambuco* to have been her port of loading, she was lost in going from

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(a) 4 *Tenn.* 229.

thence to *St. Salvador*, that is, she was proceeding *southwards* instead of to the *north*, which would have been her direction to *London*. They said it had been decided again and again, that where a party has a liberty of touching at any port, that must be understood to mean any port in the course of the voyage from the place where the risk is to attach, to the *terminus ad quem*. In support of this position they cited the case of *Gairdner v. Senhouse (a)*, where on a policy from *London* to *Trinidad*, or the *Spanish Main*, the court held that "leave to call at all or any of the *West India* islands, and liberty to touch and stay at any ports or places whatsoever and wheresoever," must be restricted to places in the direct course of the voyage. In *Hogg v. Horner*, *N. P.* after *Mich.* 1797, *MS.* cited 1 *Marshall* on insurance, 191: A ship was insured "at and from *Lisbon* to a port in *England*, with liberty to call at any one port in *Portugal* for any purpose whatsoever." Lord *Kenyon* held that her going from *Lisbon* to *Faro*, for the purpose of completing her cargo, *Faro* being out of her direct course to *London*, was a deviation which discharged the underwriters. As to the declaration, they contended that the same objection applied to both counts, for she could neither be said to have been upon her voyage to *London* from *Pernambuco*, nor to have been proceeding on her voyage *towards London*, when the loss happened.

Lord Chief Justice GIBBS, after stating the facts, proceeded thus:—The ship appears to have been engaged as a privateer or letter of marque, and her owners, meaning to end that adventure, insured her for her trading adventure. The object of the insured was to protect themselves from the time of beginning the latter adventure, and there is no doubt but she might have been insured

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(a) 3 *Taun.* 16.



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against all risks till her cargo was completed. I am of opinion that the words of the policy are sufficient to cover these risks. The ship arrived off *Pernambuco*, and an officer was sent on shore for the purpose of procuring a cargo; failing in her attempt there, she was proceeding to *St. Salvador* with the same view, and was lost in that voyage. The defendant objects that, either the policy was not to attach till the ship's arrival at the port of actual loading, and then to be sure it did not attach at all in this case; or else that, having elected *Pernambuco* as her loading port, she was afterwards guilty of a deviation; and that, even though there might be nothing illegal in that deviation, yet that this was not the voyage insured. I think the words of the policy answer both these objections. If the policy had been at and from *Pernambuco* or any other port in the *Brazils*, there might have been some colour for the defendant's argument; but the alternative being any other port or ports, there must have been a contemplation of her going to more ports than one. The object of the policy must have been to secure the insured from all risks from the time the cruise ended, while she was receiving her cargo, and till her arrival at *London*. In the case of *Hogg v. Horner*, the words were not so comprehensive as in the present. It has been objected that, though the cruise was ended, the ship was not preparing for her voyage: I think that having come to *Pernambuco* to procure a cargo, and having sent an officer on shore for that purpose, she must be considered as preparing for her voyage within the words of the policy, and that therefore the policy had attached: I also think that she had a right to go to *St. Salvador* for the purpose of procuring a cargo. As to the objection that the voyage was not correctly stated in the declaration; supposing my construction of the policy to be a just one, the voyage might fairly be described as from *Pernambuco* to *London*.

Mr. Justice HEATH was of the same opinion, and said there was no pretence for contending that the insured must select one port to the exclusion of all others.

Mr. Justice CHAMBRE.—These questions admit of no doubt; the ship was certainly preparing for her voyage; she was to get a cargo somewhere; suppose she had got part of her cargo at *Pernambuco*, by the very words of the policy, she might have gone elsewhere to complete it. It was nothing like a deviation. As to the declaration, the second count, at least, is perfectly applicable.

Mr. Justice DALLAS concurred, and the rule was

Discharged.

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SIMMONS v. HUNT.

Wednesday,  
May 4.

THE plaintiff declared as executrix of *Henry Hunt*, against the defendant as obligor of a bond, which had been given to the testator in his lifetime. The first plea, after craving oyer of the bond and of the condition, which was for the payment of an annuity to the testator, stated that no memorial of the bond had been enrolled in the court of chancery, within twenty days after the execution thereof, according to the stat. 17 *Geo. 3. c. 26*, whereby the bond was void. The second plea, after stating that the testator had, within twenty days after the execution of the bond, caused a memorial of it to be enrolled in the court of chancery, and after reciting the memorial, proceeded thus: "which said memorial is not a good and sufficient memorial of the said bond, according to the form of the said statute, by reason whereof the bond on which this action is brought is void in law;" and concluded with a verification. The plaintiff demurred

In an action on a bond, conditioned for the payment of an annuity, a plea, stating that a memorial of the bond had been enrolled, and, after reciting the memorial, that it was not a good and sufficient memorial according to the form of the statute; without stating in what particulars it was defective, or alleging that no other memorial had been enrolled, is bad on special demurrer.

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to the second plea, shewing for causes, *first*, "that the defendant had not in the said plea shewn or alleged, that no other memorial of the said writing obligatory had been enrolled in the said court of chancery, besides the said memorial in that plea mentioned; and *secondly*, that the defendant had in his said plea alleged, generally, that the said memorial was not a good and sufficient memorial of the said bond, without alleging or pointing out in what particulars the same was defective, as he ought to have done." The defendant joined in demurrer, and on this day it came on for argument.

Mr. Serjt. *Heywood*, in support of the demurrer, contended that both or either of the above causes would be sufficient to condemn the plea: As to the first objection, as the plea only stated that the memorial which had been enrolled was insufficient, without further alleging that no other memorial had been enrolled, *non constat*, but there had been another enrolled within the twenty days. With regard to the second objection, as the plea merely stated that the memorial was not a good and sufficient memorial, the court were left to decide whether it were bad, and in what points it was so. These, he said, were points of law, and not questions fit to go to a jury; and in truth, there were no facts left by the plea for the consideration of the jury.

Mr. Serjt. *Vaughan*, being called upon to answer the first objection, insisted that the defendant having set out the memorial, and stated that it was improper, it became incumbent on the plaintiff to shew that some other memorial had been enrolled.

Lord Chief Justice GIBBS.—The way to try this question is to ask whether the plea might not be perfectly true, and yet a sufficient memorial have been filed? I think it might, and if so, the plea must be bad.

Mr. Serjt. *Vaughan* asked if the defendant might be

allowed to amend? But the court were of opinion that the defence set up by the plea was not deserving of encouragement, and accordingly gave

Judgment for the plaintiff.

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JONES and others v. RYDE and another.

Wednesday,  
May 4.

THIS action was brought to recover the sum of £1000, for money had and received by the defendants to the use of the plaintiffs; and was tried at *Guildhall*, at the sittings after last *Michaelmas* term, before Lord Chief Justice *Mansfield*, when a verdict was taken for the plaintiffs, subject to the opinion of the court upon a case, which was in substance as follows.

On the 23d of *August*, 1813, the defendants, who were bill brokers, were possessed of a navy bill, dated the 17th of *July*, 1813, and payable the 15th of *October* following, which purported to be for the sum of £1884 : 16s. : 10d. On the same 23d of *August*, the defendants offered this bill to the plaintiffs, who are also bill brokers, to be discounted; the plaintiffs agreed, and accordingly paid the sum of £1870 : 2s. : 9d., being the remainder of the sum of £1884 : 16s. : 10d., after deducting the discount, to the defendants, who delivered to them the navy bill in return. On the 27th of the same month, the plaintiffs offered it to a Mr. *Williams*, who likewise agreed to discount it, and paid the plaintiffs the sum of £1871 : 3s. : 5d., receiving the bill from them in return. This bill, at the time it was issued from the transport office, had been drawn for the sum of £884 : 16s. : 10d. only, but between that period and the 23d of *August*, it had been altered by

*A.* having a navy-bill which purports to be for 1800*l.*, pays it to *B.* for that sum; *B.* passes it to *C.*, who presents it at the navy office for payment, when it appearing that it was originally drawn for 800*l.* only, and that the sum had been fraudulently altered to 1800*l.*, the navy office detained the bill, issuing a fresh one for 800*l.*; *C.* demands and receives of *B.* the remaining 1000*l.*:—Held, that *B.* is entitled to recover the 1000*l.* from *A.*, though all the parties were equally ignorant of the fraud.

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some person in its form and purport, by prefixing the figure 1 to the figures £884 : 16s. : 10d.; so that the bill then purported to be for the sum of £1884 : 16s. : 10d. : The date of the bill had been likewise altered from the 7th of *July* to the 17th, and the time when it became due was in like manner changed from the 15th to the 5th of *October*. In this state the bill had been discounted by the plaintiffs for the defendants, and by Mr. *Williams* for the plaintiffs; but neither the defendants, nor the plaintiffs, nor Mr. *Williams*, at the time of their respectively discounting it, had any knowledge of its having been so issued and altered. The bill remained in the hands of Mr. *Williams* till the 5th of *October*, when it was presented at the navy pay office, but was refused payment, on account of the alterations; and it was required by the commissioners for the transport department, that the bill so altered should be deposited with them, and a new one issued in lieu of it for the original amount. This was accordingly done, without any communication with the defendants, and without their knowledge; and Mr. *Williams* thereupon received from the pay-office the sum of £883 : 16s. : 3d. only, being the amount of the bill as originally issued, after deducting £1 : 0s. : 7d., for the property tax charged on the interest. Mr. *Williams* then demanded of the plaintiffs repayment of the £1000, being the difference between the sum which he had advanced on discounting the bill, and that which he had received from the navy board: The plaintiffs accordingly repaid the sum of £1000 to him, and the present action was thereupon brought by the plaintiffs to recover the same sum from the defendants. If the court should be of opinion that the plaintiffs were entitled to recover, the verdict taken for them for £1000 was to stand; but if otherwise, a nonsuit was to be entered.

On this day the case came on for argument, when

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Mr. Serjt. *Lens*, for the plaintiffs, premised that, in order to entitle them to recover back the difference between the real bill, and the sum which it purported on the face of it to be worth, it was only incumbent upon them to shew that that sum had been received by the defendants on a consideration, which, though supposed to be valid between the parties at the time of the transaction, had altogether failed. This, he said, was the ordinary case of a sum of money having been received by one party, without any imputation of fraud on either side, on an instrument which turned out not to be of the value which it apparently bore. He contended that, if a person sell to another an instrument bearing an intrinsic value, for more than that sum, when the real value appears, the purchaser is entitled to recover back so much as exceeds the real value, because it was paid without a consideration. Both parties, he admitted, were equally innocent, and equally ignorant of the facts, but the defendants had received £1800 of the plaintiffs on the supposition that they were giving the worth of that sum; the instrument afterwards appears to be worth only £800, not from any fluctuation of the market, but from the inherent defect of the instrument. There was no understanding that the plaintiffs took the bill for better for worse; no risk to be run on it, except that which was incidental to all such instruments, viz. that of being dishonoured when presented for payment: It was not, therefore, the case of a man having been mistaken in his speculation, but it was a simple agreement that the bill should be taken for what it was really worth. He said, there were no authorities exactly in point, but he anticipated the case of *Price v. Neale* (a), which he supposed would be cited by the other side. In that case, the

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(a) 3 Bur. 1354.

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plaintiff had accepted a forged bill, which was afterwards indorsed to the defendant, and taken up by the plaintiff when due; the court held that the plaintiff was not entitled to recover back the money so paid: That, however, was very distinguishable from the present case, because there the plaintiff had, by his acceptance, acknowledged the validity of the bill, and he had therefore no equitable claim upon the defendant. [Lord Chief Justice Gibbs.—The case of *Barber v. Gingell* (a), is a stronger case; that was an action against the acceptor of a bill of exchange, to which one defence was that the acceptance had been forged by the drawer; but the plaintiff having proved that the defendant had paid several bills, to which, as to that in question, the drawer had written acceptances in the defendant's name, Lord Kenyon held that the defendant had by so doing adopted the acceptance, and made himself liable.] That case, the learned Serjt. said, was decided on the same principle as that of *Price v. Neale*, viz. that where a party acknowledges an instrument to be genuine, he is concluded by such acknowledgment; but, in the present case, each was in the same situation as the other, and it therefore fell within the general principle, that where there has been no fraud or neglect on either side, the money which has been paid on a consideration which fails, cannot be retained, at least *pro tanto*, for which the consideration has failed.

Mr. Serjt. *Vaughan*, *contra*, insisted that the parties being equally innocent, the maxim of *potior est conditio possidentis* must prevail; in support of which position he cited *Ancher v. The bank of England* (b), on which occasion Lord Mansfield said that where there was equal equity, possession must prevail; and that the equity was equal between persons who were equally innocent. The

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(a) 3 Esp. Rep. 60.—(b) Doug. 637.

transaction here was, that certain bill brokers had met for the purpose of passing from one to the other certain securities; it happened that this was a government security, (it would have been the same thing, had it been a bill of exchange) which the defendants sold to the plaintiffs; for this must be considered merely as a sale, since the defendants gave no indorsement or security beyond what the instrument itself gave; they did not pledge their personal credit, and the plaintiffs, therefore, took it on their own risk: The latter afterwards passed it away to a third person, and this, he said, was clearly such an adoption as precluded the plaintiffs from calling on the defendants to refund; at least, they should have communicated the forgery, and made their claim as soon as possible upon the defendants. [Lord Chief Justice Gibbs.—That is an ungracious argument for the defendants to make use of; for it was clearly a forged instrument, and the plaintiffs, therefore, might have recovered the whole amount from the defendants.] If *Williams* had recovered against the plaintiffs, he admitted that the latter would have had a claim against the defendants; but he contended that the plaintiffs should have resisted the application made by *Williams*, and have left him to his action. If they had paid it voluntarily, it must be considered as a payment in their own wrong. If both parties were equally innocent, why was the loss to fall on the defendants, more than on the plaintiffs? [Lord Chief Justice Gibbs.—The defendants might have recovered it back from the person from whom they received it.] It did not follow, he said, that, because the consideration had altogether failed, the plaintiff was entitled to recover. In *Bree v. Holbeck* (a), where an administrator, having found a mortgage deed among the intestate's papers, had

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(a) *Doug.* 654.



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assigned it more than six years back for the mortgage money; the mortgage deed proved to be a forgery; the court held that the assignee was not entitled to recover, unless the assignor knew it to be a forgery. So in the present case, unless the defendants could be fixed with some fraud or knowledge of the forgery, they could not be made liable. He compared this to the case of a horse sold without a warranty. [Mr. Justice *Chambre*.—Suppose a man sell a horse, which turns out to have been dead at the time of the sale.] There the defect would appear on the face of the transaction. The case of *Price v. Neale*, he said, was strong authority in favour of the defendants, and was in substance the same as the present. [Lord Chief Justice *Gibbs*.—There is an obvious difference between the two cases; for in *Price v. Neale*, the money was paid by the person whose peculiar duty it was to see that the bill was a good one.] This was not a transfer of mere waste paper; for the instrument was worth something, and *Williams*, who must be considered as standing in the plaintiff's place, had recovered something upon it. [Lord Chief Justice *Gibbs*.—If the plaintiffs, or *Williams* in their place, had done what you suggest, and had held out against the commissioners, refusing to receive less than the apparent amount of the bill, the question to-day had been, not whether they should recover £1000, but £1800.]

Mr. Serjt. *Lens*, in reply, distinguished this from the case of *Bree v. Holbeck* above cited, because there the administrator had covenanted against his own acts and those of the intestate only; and by so doing, he precluded the idea of any further warranty.

Lord Chief Justice *Grass*.—I am of opinion that the plaintiffs are entitled to recover, and on the grounds on which my brother *Lens* founded his argument, viz. that it was an exchange between the parties, on the one hand,

of a navy-bill professing to be for £1800, and so represented by the party delivering it; and on the other hand, of the sum of money which the bill purported to be worth, *minùs* the interest. Both parties were mistaken as to the value of the bill. Proving to have been, to a certain extent, forged, I think the person originally in possession of it ought to pay to that extent to the person who received it from him. The ground of resisting this claim is, that it was a negotiable security, without indorsement; and that when the holder of a negotiable security passes it away without indorsing it, he means not to be responsible upon it. This doctrine was fully discussed in the case of *Fenn v. Harrison (a)*, and the proposition is true, but only to a certain extent. If a man pass an instrument of this kind without indorsing it, he cannot be sued *as* indorser; but he is not released from the responsibility which he incurs, by passing an instrument which purports to be of greater value than it really is. The case of *Bree v. Holbeck* is very distinguishable from this? In that case, the mortgage deed, as far as appeared, was valid, and it was the duty of the administrator, to administer it as part of the intestate's effects; but common prudence required him not to covenant beyond a certain extent; and he therefore covenanted against his own acts only, and those of his intestate; that circumstance precluded the presumption of any further security. This question must often have occurred in the case of bank notes: I believe it is not disputed, but that if a man take a forged note, he is entitled to recover the amount of it from the person of whom he received it; and I cannot distinguish this from the case of a promissory note; for though one should not be answerable on the note as party

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(a) 3 T. R. 757.

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to it, one should be liable for the money which had been paid on the supposition of its being worth so much.

Mr. Justice HEATH was of the same opinion, and cited the case of *Cripps v. Reade (a)*, where the defendant, supposing himself to be the legal representative of a lessee for years, sold the lease to the plaintiff, but without any deed of conveyance, promising, if any thing happened, to see the plaintiff righted; the real representative having ejected the plaintiff, Lord *Kenyon* held that, the money having been paid under a misapprehension by both parties, the plaintiff was entitled to recover it back as for money had and received.

Mr. Justice CHAMBRE.—There can be no doubt in this case: The general principle is perfectly clear, that where money has been paid without a consideration, it is to be recovered back. It would be very mischievous if the doctrine contended for by the defendants could be supported, as it would very materially affect the credit of these instruments. The person who takes them, gives credit to the person who passes them to him for the amount; and if they fail, the money must be refunded. In this case, the plaintiffs, or at least *Williams*, who stood in their place, have done nothing but what was for the advantage of the defendants.

Mr. Justice DALLAS.—It is agreed that both parties were equally innocent, and had equal means of knowledge. Both on principle, therefore, and on the authority of cases, the plaintiffs are entitled to recover. The money was paid by mistake; the case therefore falls within the principle of *Cripps v. Reade*, cited by my brother *Heath*.

Verdict for the plaintiff (b).

(a) 6 T. R. 606.—(b) See the next case.

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THIS was also a special case for the opinion of the court, under circumstances exactly similar to the preceding case of *Jones v. Ryde*, except that the instrument, which in the present case was a victualling bill, after passing from the possession of the defendants, through the hands of the plaintiffs, to the bank of *England*, was by the latter presented at the victualling office and there paid. On discovery of the forgery, the victualling office received from the bank of *England*, and the bank from the plaintiffs, the difference between the apparent and the real value of the bill. The case came on for argument on *Saturday*, the 14th of *May*, when

So, though the full apparent amount of the bill should have been paid by the office, on presentment.

Mr. Serjt. *Pell*, for the defendants, contended that the payment by the victualling office was a feature in the present case, which distinguished it from that of *Jones v. Ryde*, inasmuch as it was incumbent on that office to have ascertained that it was a valid instrument; and they not having done so, the payment was in their own wrong, and was such a recognition of the instrument, as brought this case within the principle of *Price v. Neale* (a). Then if the victualling office could not have sustained an action against the bank of *England*, from whom they received the bill, neither could the bank have recovered against the plaintiffs, nor the plaintiffs, consequently, against the defendants. He further contended that, in this case, there was a greater degree of neglect in the victualling office, in not communicating the forgery, than in the navy office in the foregoing case. [Lord Chief Justice *Gibbs*.—There cannot be different degrees of neglect in the two cases.]

Mr. Serjt. *Best*, *contra*, relied on the same arguments

(a) 3 *Bur.* 1354.

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which had been used for the plaintiffs in *Jones v. Ryde*, and insisted that the victualling office was not obliged, like the acceptor of a bill of exchange, to know whether the instrument were valid or no.

The court took time to consider of this case till *Tuesday* the 19th of *May*, when the Chief Justice delivered the opinion of the court; which was that there was no substantial reason for distinguishing this from the case of *Jones v. Ryde*, and that therefore there must be, as in that case,

Judgment for the plaintiff.

Thursday,
May 5.

HODGSON v. TEMPLE.

A. is arrested and held to bail in a civil action, after which an extent issues against him at the suit of the crown, and he is thereupon committed to the custody of the sheriff of *London*. On an application to the court by the bail for relief:—Held, 1, that the bail were not entitled to enter an *exoneretur* on the bail piece; 2, the crown having refused its consent to the defendant being surrendered, unless he should be immediately remanded to the custody of the marshal; that this court would have no authority so to remand him, after he had been surrendered to the warden of the fleet; and 3, that the bail could not surrender the defendant by *habeas corpus*, as a matter of right, without the consent of the crown:—But the court expressed their readiness to give the bail time for surrendering the defendant.

Mr. Serjt. Vaughan, on the first day of this term, obtained a rule to shew cause, either why the defendant should not be brought up by writ of *habeas corpus*, from the custody of the sheriff of *London*, to be surrendered to the warden of the fleet, in discharge of his bail; or else, why an *exoneretur* should not be entered on the bail-piece. He moved on an affidavit, which stated that the defendant had been arrested and held to bail for £14,000, at the suit of the plaintiff, on the 2d of *December*, 1812; that his bail justified in that action on the 10th of *February*, 1813; and that an extent issued against him at the suit of the crown, for certain excise penalties, on the 25th of *March*, 1814, in consequence of which, he was committed to the custody of the sheriff of *London*; so

that the bail had become responsible more than a year before the extent issued, though the plaintiff did not obtain final judgment till after it had issued. The Chief Justice stated that this application had been made to him in the last vacation, while his lordship was on the circuit, but it was admitted that it could not then be supported, for want of the consent of the crown. Afterwards, in the same vacation, the bail, having obtained the consent of the solicitor on the part of the crown, that the defendant should be surrendered, on condition of his being immediately remanded to the custody of the marshal, made a second application. The Chief Justice, being doubtful whether, after the defendant had been surrendered to the warden of the fleet, he should have any authority to take him out of that custody, referred the parties to the court. He now expressed his opinion that the parties had been misled by the case of *Bond v. Isaac (a)*, where the defendant, who was an impressed man in the custody of the keeper of the *Savoy*, was brought up by writ of *habeas corpus* by his bail, and the only doubt entertained by the court was as to the disposal of him.

Mr. Serjt. *Vaughan* said that he now moved on the right which, he contended, the bail had to make this motion, not following up the application which had been made to the Chief Justice, because the crown had refused its consent to that, except on conditions which, he insisted, it had no right to impose. The question, he said, was, what mode of relief could be afforded to the bail. He cited the case of the bail in *Boise v. Sellers (b)*, where the court of *King's Bench* permitted the king's debtors to be surrendered by their bail in the civil action, it appearing that that action was for a just debt, and had been brought before the information had been filed at the suit

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(a) 1 *Bur.* 339.—(b) 1 *Str.* 641.

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of the crown. He also cited *French's* case (a), where the defendant, being out on bail in an action in the *King's Bench*, was taken on an extent at the queen's suit; the bail brought him up by *habeas corpus*, and the court committed him to the marshal in their discharge, the action being precedent to the extent, notwithstanding great opposition on the part of the attorney-general:—And *Chitty's* case (b), where the defendant, having been committed to the *Fleet* by the court of *Exchequer*, for not paying a debt due to the crown, was surrendered to the marshal in discharge of his bail, in a cause depending in the *King's Bench*, and the court held that by *habeas corpus* from the *Exchequer*, he might be recommitted to the fleet; stating that this had often been done, both in civil and criminal causes. He contended that the case of *Bond v. Isaac*, above alluded to, went the whole length of the present application, and he supported his motion by stat. 25 Ed. 3. c. 19. (c).

On this day, the several parties who were concerned in resisting this application, shewed cause against the rule.

The *Solicitor-General*, on the part of the crown, said it was a general rule that, on an extent, a prisoner could not be removed from one custody to another without the consent of the crown; in support of which proposition, he cited *Coates's* case (d), and *Sandys v. Spivey* (e). The two cases on which the bail relied for the support of their application, were only short notes, which did not state when the judgments, on which the respective executions issued, were signed; and he contended that the priority

(a) *Salk.* 353.—(b) 1 *Wils.* 248.—(c) By that statute it is enacted "that, notwithstanding the protections given by the king to " his debtors, those who have actions against such debtors shall be " answered by them in the king's court: And if judgment be there- " upon given for the plaintiff, execution shall be put in suspense, " till gree be made to the king of his debt."—(d) *Barnes* 385. —(e) *Id.* 388.

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of suit on the part of the subject must be established by his judgment having been signed before the process at the suit of the crown; not by the periods of time when the suits were respectively commenced; for by stat. 33 *Hm. 8. c. 39. s. 74.*, it was enacted, "that if any suit be commenced, or process awarded for the recovery of the king's debts, such suit or process should be preferred before that of any person; and that the king should have first execution against any defendant for his said debts, before any other person; *so that the king's suit be commenced, or process at his suit be awarded, before judgment given for the said other persons.*" In the present case, he admitted that the plaintiff's action had been brought before any suit had been instituted by the crown; but pending that action, and before final judgment, the information had been filed. [Mr. Justice *Heath*.—Suppose the defendant were to be surrendered to the warden, and then immediately remanded to the custody of the marshal, what objection could you make to that?] There could then be no objection on the part of the crown. [Lord Chief Justice *Gibbs*.—But what right have we to send back a prisoner to the custody of the marshal, by our mere order, when he has been surrendered to the warden of the *Fleet*? If any such practice exist, it must have originated from that case in *Burroughs*.] There were instances, he said, where persons in custody on criminal process, had been charged by the plaintiffs in civil actions in custody of the sheriff, but there was no case where the bail had been permitted to surrender such person, against the consent of the crown. There were also cases where the exchequer would grant a *habeas corpus*, when the custody had been *inadvertently* changed (a). As to the stat. 25 *Ed. 3.*, that act only gave the civil creditor a

(a) *Barnes* 389.

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right to bring his action and proceed to judgment; but so far from giving authority to bail to surrender the defendant, it expressly suspended the execution, till *græ* should be made to the king for his debt.

Mr. Serjt. *Best*, on the part of the sheriff, suggested that this difficulty might be obviated, by the court suspending the time for the bail to surrender their principal; and he cited the case of *The King v. Fearne (a)*, where a man was convicted, before Mr. Justice *Heath*, of setting fire to his house, and was sentenced to be imprisoned. Bail had been put in for him in a civil action, and the court, on his (Mr. Serj. *Best's*) motion, allowed the bail time for rendering the defendant, during the period of his imprisonment. By adopting this method in the present case, the bail would be relieved from the hardship of their situation, and on the other hand, the court would not be called upon to decide the question, whether they had it in their power to change the custody of the defendant.

Mr. Serjt. *Lens*, on the part of the plaintiff, disclaimed any advantage arising from priority of suit with reference to that of the crown, and contended that he could not be called upon to give his consent to this application, at least, not to that part of it which related to the *exoneretur* being entered on the bail-piece. This motion was made solely on the part of the bail, to be relieved from their responsibility; but that object could not be accomplished unless the principal were in a condition to be surrendered: The court would not assist the bail to the prejudice of the plaintiff. He cited the case of *Sharp v. Sheriff (b)*, where the court of *King's Bench* refused a *habeas corpus*, for the purpose of surrendering the defendant in discharge of his bail, until the latter had justified; and that

(a) *Surrey summer assizes 1807.*—(b) 7 T. R. 226.

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of *Falkin v. Critico* (a), where the defendant being in custody for the purpose of being sent out of the kingdom under the alien act, the court refused to enter an *exoneretur* on the bail-piece, while he remained in the kingdom, and there was a possibility of his being again at large. Unless, therefore, these bail could shew some mode by which this application could be granted, without prejudice to the rights of the other parties, the court would not comply with it. [Lord Chief Justice *Gibbs*.—Where, on the surrender, the court could recommit to the custody of the marshal, no objection being made to it, they would do it at once, without any previous surrender; they would consider the intermediate steps as having been taken, and would go at once to the result.] In the present case, however, there was an objection, both to the steps and to the result.

Mr. Serjt. *Vaughan*, in support of the rule, contended that no reason had been urged, which was sufficient to prevent the court from granting this application. As to the plaintiff, he, of all the parties, was the least entitled to object, because it was through his neglect that the principal had not been taken at his suit, and he might even now lodge a *capias ad satisfaciendum* with the sheriff. The courts, he said, were always inclined to favour bail, when they had shewn a disposition to comply with their recognizances; and, on the other hand, would never assist a plaintiff, who had not used a proper degree of diligence. The case of *Sharp v. Sheriff*, which had been cited on the part of the plaintiff, was in favour of the bail, for there the court had in fact granted their application, and had shewn a strong disposition to favour them. With regard to the crown, could it be doubted for a moment, that the exchequer would immediately grant a *habeas*

(a) 13 *East*. 457.

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corpus, when the crown had it in its own power to choose the place of custody for its prisoners (a)? [Lord Chief Justice *Gibbs*.—Where the custody has been changed inadvertently, the exchequer would grant a *habeas corpus*, but that cannot be said to be the case, where the court does it on deliberation, and with the consent of the crown.] *French's* case, and that of *Boyce v. Sellers*, above cited, he contended, were unanswerable, and went the whole length of what he was applying for. [Mr. Justice *Heath*.—These cases do not apply; because they were in the *King's Bench*; and though that court might have authority to remand the defendant at once upon his surrender, it does not follow that this court has the same power.] Mr. Serjt. *Lens* then insisted that, at all events, the bail were entitled as a matter of right to enter an *exoneretur*, where the principal was not amenable. He cited the case of *Grant v. Fagan* (b), where, on a motion to enlarge the time for the bail to render their principal, on the ground that he had been detained in *France*, as a prisoner of war, the court of *King's Bench* assigned as a reason for refusing the application, that the render had not become impossible by the act or law of this state, which would have excused the performance: As, therefore, in the present case, the bail were prevented by the law of this state from rendering their principal, he concluded that they were entitled to succeed on this motion.

The court took time for consideration, and on this day the Chief Justice delivered the opinion of the court. This application is in effect threefold: *First*, to enter an *exoneretur* on the bail-piece; *secondly*, if the bail should not be entitled to demand that, to grant a *habeas corpus* to bring the defendant up out of the custody of the mar-

(a) *Barnes* 385, 388. 1 *Str.* 641.—(b) 4 *East.* 189.

shal, and surrender him to the warden of the *Fleet*, and then immediately remand him to the sheriff of *London*; or, *thirdly*, if the court should not think themselves authorised to comply with that part of the application, to grant a *habeas corpus*, as matter of right, to surrender him in discharge of his bail. The information, at the suit of the crown, was filed after the civil action was commenced, but before the plaintiff obtained judgment. As to entering an *exoneretur* on the bail-piece, we are clearly of opinion, that that part of the rule cannot be complied with. In *Folkein v. Critico*, which was cited on the part of the plaintiff, the court held, that when the defendant could by possibility be again at large, an *exoneretur* could not be entered; in the present case, the defendant might at any time release himself from the extent, by paying the amount of the penalties. With regard to surrendering the defendant to the warden of the *Fleet*, and then remanding him immediately to the custody of the sheriff, that part of the application supposes that he cannot be surrendered in discharge of his bail, without the consent of the crown; and that consent is withheld, except on condition of his being instantly remanded. If the court had authority to do this, they would willingly comply, and it would obviate all difficulty; but such a course might be attended with such serious consequences to third persons, that the court cannot adopt it. Many cases were cited to prove that the court has authority to do this, but those were all criminal cases in the *King's Bench*, and certainly that court has often ordered a prisoner, who has been surrendered in discharge of his bail, to be remanded to the custody of the marshal; but they have done this as a court having criminal jurisdiction: The defendant is brought up as a criminal, and then the *King's Bench*, as the first court of criminal judicature, is entitled to take him out of the custody in which he has been detained,

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and commit him to any other. In such case the *babeas corpus* is taken out on the crown side, and indeed it was decided in the case of *Fowler v. Dunn* (a), that it could not be taken out, except on the crown side. The *crown* has, in some cases, after the defendant has been surrendered and committed by the court to their own custody, returned him by *babeas corpus* to the custody from which he was taken; and I think that can hardly be confined to cases where the court has committed him inadvertently, though it is so intimated in *Sandys v. Spivey* (b): But there is no case where the *court* has remanded a defendant, who has been brought up charged with a civil suit, to any other custody. As no authority has been cited to shew that this court has ever done what it is now required to do, and as it is at least very doubtful whether it has any such power, we are of opinion that we cannot remand the defendant, when surrendered, back to the custody of the marshal; and as the crown refuses its consent to the surrender, except on condition that he shall be so remanded, we come to the only remaining question, whether the bail be entitled to surrender him, as a matter of right, without the consent of the crown. It is contended on this part of the application, that the court has a right to direct the defendant to be surrendered in discharge of his bail, and that the crown must afterwards take its own course for recovering the custody of him; and in support of this position, it is urged that the crown may always choose the custody of its own prisoner. The cases cited from *Barnes*, p. 385 and 388, both go the length of establishing this proposition; but the latter case goes on to state that, without regard to the priority of suit, the demand of the crown is

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(a) 4 Bur. 2034.—(b) *Barnes*, 388;

always to be preferred before that of any private person. It is clear, therefore, that the *plaintiff* in the civil suit, can in no case remove the defendant out of the custody in which the crown has placed him, without the consent of the crown. But in order to shew that the *bail* are entitled to do so, many cases were cited, which it is very difficult to understand. In *French's* case (*a*), and *Boise v. Sellers* (*b*), the bail were permitted to surrender the defendants, notwithstanding the resistance on the part of the crown, on account, as it is stated, of the priority of suit on the part of the plaintiff; and in the latter case the motion was made on the authority of the stat. 25 Ed. 3. In *Chitty's* case (*c*), it does not even appear that the plaintiff had priority of suit, and therefore either the *attorney-general* must have given his consent, or the report of the case must be defective in some other point. The case of *Bond v. Isaac* (*d*) is very distinguishable from the present, because the defendant was an impressed soldier, and had been taken out of the custody of the keeper of the *Savoy*, who, of course, would be ready enough to receive him back again. But this case was cited as an authority to shew that where the plaintiff has priority of suit, the bail are entitled to surrender the defendant; and to be sure what is there said by Mr. Justice *Foster*, with reference to stat. 25 Ed. 3. c. 19, seems to favour that doctrine. We have all looked into that statute, and cannot conceive on what ground the learned judge formed his opinion. We find, by that act, that the crown had been accustomed to protect their debtors against all other creditors; and the legislature, seeing the mischief of such a practice, diminished this power of the crown, by authorizing the civil creditor to

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(a) 1 Salk. 353.—(b) 1 Str. 641.—(c) 1 Wils. 248.

(d) 1 Bur. 339.

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proceed up to judgment : suspending, however, the execution, till satisfaction be made to the crown : In the present case, the question rests entirely on what can be done *after* execution. From the cases which have been cited from *Barnes*, it is clear that the *plaintiff* has no power to remove the defendant from the custody of the sheriff, to that of the warden of the *Fleet*. If, then, the plaintiff, to whose interest alone the statute applies itself, cannot do it, what authority can the bail derive from it for that purpose? We are therefore of opinion that the present rule cannot be supported in any or either of its branches. But the bail are not to be left without remedy; and the court will be very ready to listen to any application on their part, for time to surrender the defendant : It is true, that he may pay his debt to the crown, and then remove himself out of custody; that is a risk which bail always incur, and from which the court cannot relieve them.

Rule discharged.

Friday,  
 May 6.

SWAN v. COX.

*A.* in June 1811, **THE** plaintiff declared that one *James Lambellie*, on the agrees to purchase a house of *B.* for 1000*l.*, paying 300*l.* down; full possession to be given by the 1st of June 1812. 26th of June 1811, drew a bill of exchange upon the defendant, payable three hundred and forty days after date, for the sum of £203: 19*s*: 3*d.* for sundry bills, due at *Little Hampton*, for value received; and delivered

*B.* is arrested in June 1811, on which *A.* accepts a bill for *B.* in favour of *B.*'s creditors, payable if the house should be given up on the 1st of June 1812. At *B.*'s request, *A.* puts his nephew into the house to take care of it, while *B.* remains in custody. *B.*, having a bad title to the house, gives up all claim to it, and *A.* purchases it of the real owner, being allowed the 300*l.*, which he had paid to *B.*—Held that the possession which *A.* had of the house from *B.*, was not such a compliance with the condition of the acceptance, as to support an action by the holder of the bill against *A.*

the said bill to the plaintiff; and that the defendant afterwards accepted it, "to be paid, if a certain house in the acceptance mentioned should be given up to him on the 1st of *June* 1812." The declaration then averred that the said house was given up to the defendant on the 1st of *June* 1812, according to the form and effect of the said acceptance. At the trial of the cause at the sittings after last *Michaelmas* term at *Guildhall*, before the late Lord Chief Justice *Mansfield*, it appeared that on the 19th of *June* 1811, the defendant had agreed with *Lambellie* for the purchase of a house and furniture at *Little Hampton*, for the sum of £1000; £300 of which were to be paid, and in fact were paid, at the time of making the agreement. Full possession was to be given by the 1st of *June* 1812, and all the outgoings to be cleared up to that time by *Lambellie*. In the latter end of *June* 1811, *Lambellie* was arrested for shooting at a sheriff's officer, and while he was in custody for that offence, his creditors, among whom was the plaintiff, prevailed on the defendant to accept the above bill of exchange, in order to cover their demands on *Lambellie*. It was proved that the defendant, at the request of *Lambellie*, procured his nephew and another person to take care of the house, and employed people to clean it from time to time; and the defendant's nephew stated that he held it on his uncle's account. On the 27th of *June* 1811, a notice was served on the defendant from a *Mrs. Moore*, desiring him not to pay any more money to *Lambellie*, on account of the purchase; he, *Lambellie*, having obtained possession of the premises from her by fraud. On the 4th of *July* following, *Mrs. Moore* filed a bill in the exchequer, praying, among other things, that an injunction might issue to restrain the defendant from parting with the title deeds; and on the 20th of the

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same month, an injunction was served on the defendant, restraining him from paying any more money on account of the purchase, and from parting with the deeds. The defendant, in his answer to this bill, admitted that he was in possession of the premises, but stated that no assignment had been made of them to him, in pursuance of the agreement between himself and *Lambellie*. On the 20th of April 1812, *Lambellie* executed an assignment to Mrs. *Moore*, in which he admitted that he had obtained the premises by fraud; and the defendant afterwards completed the purchase of the premises of Mrs. *Moore*, who allowed him the £300 which he had paid to *Lambellie*. Under these circumstances, Lord Chief Justice *Mansfield* directed a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit, in case the court should be of opinion that the condition of the acceptance had not been complied with.

The *Solicitor-General*, accordingly, in *Hilary* term, obtained a rule *nisi*.

Mr. Serjt. *Best* now shewed cause.—He contended that, the defendant having admitted that he was in possession of the house, the condition of the acceptance had been sufficiently complied with; and that it was not necessary that *Lambellie* should make a good title to it. If that had been the intention of the parties, the acceptance would have been in very different terms. This he urged with regard to the express words of the contract; but looking at the circumstances of the case, it was plain, he said, that possession was all the defendant meant to bargain for. He contended that, as Mrs. *Moore*, by allowing the defendant the £300, which he had paid to *Lambellie*, had recognized the former agreement as valid, he ought also to have deducted from his payment to her, the amount of this bill; if he had not

done so, he ought to be the sufferer, and not the creditors of *Lambellie*.

The *Solicitor-General* *contra*, was stopped by the court.

Lord Chief Justice GIBBS.—I am of opinion that the plaintiff cannot support this action. When *Lambellie* was arrested, the defendant, having entered into this agreement for the purchase of the house, considered that it was immaterial to him, whether he paid *Lambellie* himself, or *Lambellie's* creditors; and, accordingly, on the latter expressing a wish that he would pay his creditors, he agreed to be answerable for the amount of their claims, provided he were put in a situation to be liable to pay *Lambellie*. He therefore accepted the bill, payable if the house were given up to him on the 1st of June, 1812. The brevity of this memorandum makes it necessary to refer to the extrinsic matter; and it is natural to suppose the meaning of the parties to have been, that the house should be given up according to the previous agreement. On *Lambellie* being arrested, it was necessary that some one should take care of the house, and the most natural person to choose for that purpose was the defendant, who would ultimately be interested in it. No doubt, his nephew looked as much to his uncle's interest, as to *Lambellie's*; but the question is, whether in point of fact, he were not merely in possession for *Lambellie*. I am of opinion that this was not the possession meant by the agreement, but merely a custody given to the defendant, till *Lambellie* should be in a condition to complete the transfer.

The rest of the court were of the same opinion.

Rule absolute.

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Monday,
May 9.

HARDY *qui tam*, &c. v. CATHCART, clerk.

The record in a penal action, where the jury by mistake gave damages, being carried by writ of error to the *King's Bench*, the plaintiff may enter a *remit-titur* of the damages on the record, and the transcript may be made conformable thereto.

MR. Serjt. *Copley*, in *Hilary* term, obtained a rule calling on the defendant to shew cause, why the plaintiff should not be at liberty to enter a *remititur* of damages on the record of the judgment in this cause, and why the transcript of the said record should not be made conformable thereto. It was an action brought on the stat. 43 *Geo. 3. c. 84*, for non-residence, and was tried at *York*, at the *Spring* assizes, 1812, when the jury found a verdict for the plaintiff, giving damages 1s. The defendant afterwards brought a writ of error, and the transcript was carried into the court of *King's Bench*; the error assigned being, amongst other causes, that the verdict was found, and the judgment given, for *damages* and costs.

Mr. Serjt. *Lens*, on a subsequent day in the same term, shewed cause against the rule: He cited *Cuming v. Sibley* (a), as establishing the principle that no damages could be given for the detention of a debt in a popular action. Then, as to the amendment that the plaintiff prayed for, he said that at common law, after there had been a judgment, the proceedings, being no longer in paper, could not be amended; the present rule, therefore, could not be granted, unless the plaintiff could shew that the case fell within the statutes of amendment, or those of *jeofails* (b). He contended, that there was no-

(a) 4 *Bur.* 2489.

(b) The statutes of amendments, properly so called, which are the first in order of time, begin with 14 *Ed. 3. stat. 1. c. 6*, by

thing to amend by; for the error was in the judgment, and that was the subject of a writ of error, not of motion. The application should, at all events, have been made before judgment, whereas execution had even been taken out; if the judgment were to be amended, the execution could not be sustained, and that, he said, proved the inconvenience which would attend a compliance with this application. If the present motion could be sustained, any amendment might be made in any stage of the proceedings. If there had been any omission, by which the record had sustained any diminution, he admitted that such omission might have been supplied; but there was no omission, nor any inconsistency in the present case, nor was it any misprision; it was an error in the finding of the jury, which the clerk

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which it is enacted, "that by the misprision of a clerk in any place, no process shall be annulled or discontinued, by mistake of one syllable, or one letter, too much or too little; but as soon as the thing is perceived, by challenge of the party, or in other manner, it shall be hastily amended in due form, without advantage to the party challenging." The 9th Hen. 5. st. 1. c. 4, in explanation of the 14th Ed. 3. declares, "that the justices before whom the plea in record is made or depending, by adjournment, or by way of error, or otherwise, may amend such record and process, as well after judgment as before." This statute is made perpetual by 4 Hen. 6. c. 3, but with a proviso that it shall not extend to records and processes of outlawry. The 8th Hen. 6. c. 12. enacts, "that the judges may amend (in affirmance of the judgments of records and processes) all which in their discretion seems to be misprision of the clerks in such records, &c., *except appeals, indictments of treason or felony, and the outlawries of the same*, and the substance of the names and additions left out in original writs and writs of exigent." The same statute, c. 15. enacts, "that the justices may amend, at their discretion, any misprision or default made by the clerks, sheriffs, or other officers, in any records or processes depending before them, in writing a letter or syllable too much or too little, except processes, &c. of outlawries, of treason, and of felony."—The statutes of *jeofails*, begin with the 32 Hen. 8. c. 30; but the learned serjeant, on the part of the plaintiff, relied on the statutes of amendment for the support of his rule.

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of assize, in drawing up the *postea*, had adopted. The statutes of amendments, he said, on which the plaintiff would principally rely for the support of his rule, had been expressly decided not to apply to penal actions; and he referred to *Tidd's Practice*, p. 721, 5th edit. and the cases there cited, as supporting that proposition (a). Another objection, he said, was that execution had been taken out in the *King's Bench*.

Mr. Serjt. *Copley*, *contra*, observed, that the circumstance last mentioned made no alteration in the case, because there was sufficient remaining in this court, by which the judgment might be amended. It might be amended by the *nisi prius* record, which could be corrected from the judge's notes, and the transcript might then be carried into the *King's Bench*. In *Doe v. Perkins* (b) it was decided that the *postea* might be amended by the judge's notes at any time, even after final judgment, and after a writ of error had been brought. He contended that proceedings of this kind might be amended even by the notes of counsel. It was by no

(a) 1st. The *Queen v. Tutchin*, 1 *Salk.* 51, which was an information for a libel; and the writ of *distingas* being tested the 24th of Oct. instead of the 23d, the court held that this was not amendable by any statute of amendments; and Mr. Justice *Powell* held, that there were only two statutes of amendment, 14 *Ed.* 3, & 8 *Hen.* 6, the rest being statutes of *jeofails*; that the 14th *Ed.* 3. extended only to process out of the roll, i. e. to writs that issue out of the record, and not to proceedings in the roll itself; nor to the king, because of the words *challenge of the party*; and that the 8th of *Hen.* 6. had been always construed as merely enlarging the 14th *Ed.* 3, and as having been made in imitation of it; the exception in the latter stat. being only *ex abundanti cautela*.—2dly. The *Queen v. Stedman*, 2 *Lord Raym.* 1307. That case, however, turned on a point foreign to the present question; but Mr. Justice *Powell* observed incidentally, that a *misnomer* in an indictment was not amendable, and that he saw no difference between that, and an information.—3dly, *Gillb. C. P.* 116, where it is stated that none of these statutes extend to the case of the king, either to remedy the *parties*, where the party has prevailed against the king, or the king against the party.—(b) 3 *T. R.* 749.

means necessary that all the proceedings should appear to the court. He referred to *Tidd's Practice*, p. 722. 5th edit., and the cases there cited, to shew that after error had been brought in the *King's Bench*, the amendment might be made either in that court, or in the *Common Pleas*. As to the objection, that this was a penal action, he admitted that a doubt had existed, whether the statutes of amendment extended to penal actions; but that doubt, he said, had only originated from the confusion which had been made between the statutes of amendment, and those of jeofails. In *Wynn v. Middleton* (a) the court of *King's Bench* held, that nothing was excepted out of 8 *Hen.* 6, but appeals and indictments of treason and felony. He also cited *Richards v. Brown* (b), which was a penal action, and in which the court permitted the warrant of attorney to be amended, by changing the name of the attorney, conformably to that in the declaration, after error had been brought, and the variance assigned for error. The only remaining question then was, whether this were a species of amendment which the court would allow to be made. He said it was clearly a misprision of the clerk of assize, who had inadvertently inserted the damages as in an action at common law; as such, the mistake was expressly within the statute of *Hen.* 6.

The court took time to consider of the question; and on this day, Mr. Justice HEATH, as being the senior judge who was present at the argument, delivered the opinion of the court.

It was a rule at common law, that a judgment could not be amended after the term in which it had been entered up; several statutes, however, have corrected

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(a) 2 *Str.* 1227. See also, 1 *Str.* 136.—(b) *Doug.* 114.

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and supplied this defect in the law, and particularly the statute of *Hen. 6.* relieves in all cases where the error has arisen from the misprision of the clerk. Several cases were cited in which the judgment had been amended, but principally on the authority of those in *Rolle's Abridgment*, under title *Amendment*, we think the present rule should be made

Absolute.

Monday, May 9. STANIFORTH and another, assignees of HIBBERS and JAMES, bankrupts, v. FELLOWES.

Three partners, *A. B. and C.*, deliver bills to *D.* for a special purpose; *A. and B.* become bankrupts:—In an action by their assignees against *D.* for the proceeds of the bills,—held that, *C.* not having been made bankrupt, this was not a case of mutual credit within 5 *Geo. 2. c. 30. s. 18.* so as to entitle the defendant to set off the bills against a debt due to him from *A. B. and C.*

THE plaintiffs, *John Staniforth* and *Daniel Austin*, (assignees of *Herman Hibbers* and *Richard James*, bankrupts) and *Christopher Busch*, declared, in an action on the case, that the bankrupts and *Christopher Busch*, before the bankruptcy, at the request of the defendant, delivered to him divers bills of exchange, specified in the declaration, to the intent that the defendant might procure the same to be discounted for the use of the said bankrupts and *C. B.* And thereupon it became and was the duty of the defendant to procure the same to be discounted, or, in default thereof, to redeliver them to the said bankrupts and *C. B.* within a reasonable time. Yet the defendant, not regarding his said duty, did not procure the said bills to be discounted, nor did he redeliver them to the said bankrupts and *C. B.*, nor to the plaintiffs as assignees, but converted them to his own use. There were several counts, varying the statement, and a count in trover: The defendant pleaded the general issue. At the trial of the cause at the sittings after last *Michaelmas* term, at *Guildhall*, before Lord Chief Justice *Mansfield*, it appeared that the bankrupts had

been partners with *Christopher Busch*, against whom no commission had issued : That the house of *Hibbers and Co.* were considerably indebted to the defendant, who was a broker, for money advanced and bills accepted by him : That being so indebted, they applied to the defendant to discount bills to the amount of £5000 for them ; which sum, by the mutual agreement of the parties, was not strictly to be applied to the reduction of their debt to the defendant, but was to be returned to *Hibbers and Co.*, and was then to be used in taking up the bills for which they and the defendant were each responsible : That after the defendant had received these bills, not being able immediately to discount them, he learnt that it would be impossible for *Hibbers and Co.* to carry on their business any longer, though they had not yet committed an act of bankruptcy ; and that he therefore determined not to pay back the proceeds of the bills, but to keep them in liquidation of his claim upon that house.—It was contended on the part of the defendant that he was justified in so retaining the proceeds. The plaintiffs, on the other hand, insisted that the bills having been delivered to the defendant for a special purpose, he had no right to apply them to any other ; that the bills therefore, or the proceeds of them, ought to have been paid back, either to the bankrupts, or to their assignees, notwithstanding the debt which was due to the defendant from the bankrupts. The learned judge told the jury that, if the defendant had entered into an engagement to pay over the proceeds, he was not entitled to retain them to his own use ; and therefore, if they should be of that opinion, they must find their verdict for the plaintiffs, which they accordingly did.

Mr. Serjt. *Best* and Mr. Serjt. *Vaughan*, in last *Hilary* term, obtained a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the

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ground that this direction to the jury was erroneous; and on this day, when the question came on for argument, they were called upon by the court to support their rule. They cited *Atkinson* and others, assignees, &c. v. *Elliott* (a), where the bankrupt had bought two different parcels of goods of the defendant, at different times, and had accepted a bill for each parcel, at six months: When the bill for the first parcel became due, the bankrupt, being unable to take it up, deposited in the defendant's hands, as a security for the payment of it, another bill of greater value, the defendant engaging to pay back the balance, when he should receive the amount of the latter bill. The commission, however, issued soon after that bill was paid to the defendant, who then refused to pay over the balance; and in an action of *assumpsit* by the assignees to recover the same, the court held that the defendant was entitled to retain it in part satisfaction of the bill which he had received for the second parcel of goods, though that did not become due till three months afterwards. They contended that the form of action made no difference between the two cases; because, where there had been a bankruptcy, the parties had a better opportunity of setting off mutual debts in an action of trover, than in *assumpsit*; and Lord *Kenyon*, in giving judgment in *Atkinson v. Elliott*, alluded to stat. 5 *Geo. 2. c. 30. s. 28. (b)*, and gave it as his opinion, that that statute must have intended to include more than mutual debts only. That case, they said, resembled the present as

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(a) 7 *T. R.* 378.—(b) That section of the act (entitled, “an act to prevent the committing of frauds by bankrupts”) enacts, that “Where it shall appear to the commissioners, that there has been mutual credit, or mutual debts, between the bankrupt and any other person, before the bankruptcy, the commissioners or the assignees shall state the account, and one debt, may be set against another; and the balance only of such account shall be paid on either side.”

much as any two cases could resemble each other: In the latter, the plaintiffs would rely on the defendant's special undertaking to pay back the balance; but in the case cited, the defendant had given a *written* memorandum to that effect, notwithstanding which, the court held that he was entitled to retain it. They insisted that a creditor might make use of any artifice to recover the amount of his debt, and though he even obtained it by fraud, would be almost entitled to retain it. The statute above cited, relating to mutual credit, had always been construed more favourably towards persons in the situation of the present defendant, than the statutes of set-off (a). The defendant here had only been counteracting the fraud which the bankrupts had endeavoured to practise upon him; for though it had been agreed that the proceeds of the bills in question should be applied to the payment of the former bills, it was impossible that they could have been so applied; because, after the bankruptcy, they must have gone to the general satisfaction of the creditors: The defendant, therefore, would have been paying into the hands of the assignees, money which they could not have applied to the purpose which had been agreed upon; and there was no reason why the assignees should stand in a better situation than the bankrupts would have done. In *Ex parte Deane* (b), where a packer had received goods from a man who afterwards became bankrupt, for the purpose of packing them, Lord *Hardwicke* held that he was entitled to retain them, till not only the price of packing, but all other debts due to him from the bankrupt were satisfied; his lordship observing that it would be hard to say, that if a man have goods in his hands, belonging to his debtor, it should not be considered as a

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(a) 2 Geo. 2. c. 22. s. 13. made perpetual by 8 Geo. 2. c. 24. s. 4.

(b) 1 Atk. 228.

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case of mutual credit. The question, they contended, here was, whether the law could be made subservient to the justice of the case; for it was admitted that the bankrupts were indebted to the defendant to a larger amount than the sum sought to be recovered. If the plaintiffs should succeed in this action, it would be establishing a new principle in the law of set-off, viz. that where a man takes money for a particular purpose, he can in no case set it off against his own debt.

The *Solicitor-General* and Mr. Serjt. *Lens*, *contra*, distinguished this from the case of *Atkinson v. Elliott*; because in that case, though the judgment did not expressly turn on the form of action, yet the decision must have been considerably influenced by it, for the court considered it a case of mutual credit; now, though mutual credit might admit of a more liberal construction than mutual debts, it never could be carried to such an extent as the defendant was endeavouring to establish. The defendant, they said, had been entrusted with these bills, as a mere agent, for the purpose of doing a particular thing with them; instead of which, he had tortiously converted them to his own use. If the plaintiffs had brought an action of assumpsit, they would, by so doing, have recognized the act of the defendant, and would have converted him into a mere debtor for money had and received; in which case, perhaps, he might have availed himself of a set-off: But by bringing an action of trover, the plaintiffs had disavowed the whole proceedings on the part of the defendant, and had thereby precluded him from setting off his debt. In support of this proposition, they cited Lord *Kenyon's* judgments in the case of *Smith v. Hodson* (a), and in that of *Colson v. Welsh* (b). Either the defendant had received the amount of the bills, and then he had broken

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(a) 4 T. R. 211.—(b) 1 Esp. 378.

his contract, in not paying over the proceeds; or, if at the time of the bankruptcy, the bills remained undiscounted, there had been only an inchoate attempt to get the money into his hands, and he had not then a shadow of right to detain them. Another objection to the defendant's claim was, that one of the partners in the house of *Hibbers and Co.* had not been made bankrupt. The utmost that could be pretended was that this was a case of mutual credit; but the statute of 5 *Geo. 2. c. 30.* only related to cases of bankruptcy; and it never could be extended to cases where part of a firm only had been made bankrupt.

Mr. Serjt. *Best* and Mr. Serjt. *Vaughan*, in reply to the last objection, contended that, if it had been the intention of the legislature, that the statute should not operate, except in the case where all the partners were bankrupts, there would have been express words of exclusion. This was a remedial and a very beneficial law; the court, therefore, would put the most liberal construction upon it. If this case were to be considered as not falling within it, the benefit of the act would be almost annihilated; because it happened very frequently that one or two of a firm were not made bankrupts; whereas, by extending the act to cases of this sort, justice would be more likely to be attained.

Lord Chief Justice GIBBS.—I have no doubt as to the latter objection. It is perfectly certain that the defendant's claim cannot be supported by a pecuniary set-off, nor under colour of mutual credit, unless the case fall within the stat. 5 *Geo. 2. c. 30.* It has been said that there is nothing in the act which restrains it to cases where the whole firm are made bankrupts; every argument, however, of that sort turns the other way, for we are not to look for words of exclusion, but for words which would justify such a construction; since it is clear

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that, by the common law, the defendant would not have been entitled to make this claim. The statute only relates to mutual credits between bankrupts and other persons; here, if any credit existed, it was between the bankrupts together with a solvent person on the one side, and the defendant on the other; it is clearly, therefore, not within the letter of the act; nor is it within the meaning of it; because the defendant had one solvent person to whom he might have resorted; for we must suppose that person to have been solvent, who was not made bankrupt. It follows, therefore, that the defendant has given no answer to this action. We do not enter into the question, whether the defence which has been set up, supposing all the partners to have been bankrupts, would have been a good one; we found our judgment on the ground that the statute does not apply.

Mr. Justice HEATH.—A statute which gives new remedies must be construed strictly; now this statute says that the commissioners shall state the account, and strike a balance, between the bankrupts and the person who makes his claim against them. In this case, the commissioners could not have done so; and the jury cannot have a wider jurisdiction than the commissioners.

Mr. Justice CHAMBRE.—This statute was intended to give a certain extension to the statutes of set-off; but it does not take away the necessity of what was before exacted in these cases, viz. a strict mutuality. We could not extend this statute to the length required by the defendant, without the utmost violence; and I doubt if it would be good policy to do so, if we could.

Mr. Justice DALLAS.—This case is clearly not within the statute, because there is no mutual credit between the bankrupts and a third person; but it is, as has been stated by the Chief Justice, between the bankrupts, together with a solvent person, and the defendant.

Rule discharged.


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HAINES v. BUSK.

Tuesday, May 10.

THIS action was brought by a ship-broker to recover the amount of his commission, for procuring a charter party to be effected on the ship *Amalia*. At the trial of the cause before Mr. Justice *Dallas*, at the sittings after last *Hilary* term, at *Guildhall*, it appeared that the *Amalia* was a *Russian* ship, *English* owned, having been bought by the defendant, who was a *British* subject residing in *London*, of a person who lived at *St. Petersburg*. By an instrument, which purported to be a memorandum of agreement for the charter of the vessel, dated the 12th of *December* 1812, and made between the defendant of the one part, and the freighter, on behalf of *R. L.* of *Gottenburgh*, of the other part, it was agreed, amongst other things, that the ship should sail from *London* in ballast, for *Charleston* in *South Carolina*, and should there receive on board a full and complete cargo, either of rice, cotton, or other goods; and should then proceed to *Cadiz*, *Lisbon*, or one port in the united kingdom, or *Gottenburgh*. The master to receive instructions at *Charleston* whether to touch at *Cadiz*, for orders to unload there, or at *Lisbon*; or whether to touch at *Cork* for orders to unload at one port of the united kingdom, or at *Gottenburgh*. The ship to be consigned at *Charleston* and elsewhere to the af-freighter's agents (except at *London*). Also that she should carry no *British* license, nor any copy or memo-randum of that private agreement. The charter party, of the same date, and between the same parties, differed from the agreement, in stating that the ship should take in at *Charleston*, a full and complete cargo of *permitted goods*, specifying rice and cotton; and that she should sail therewith either to *Cadiz*, *Lisbon*, or *Gottenburgh*, as the

*A.* commissions  
*B.* to get a charter party effected on his ship, *Russian* built and *British* owned. She is accordingly chartered to go to *America*, and take in there a cargo of *permitted goods*, rice and cotton being specified, and to sail therewith to *Cadiz*, *Lisbon*, or *Gottenburgh*, as directed. By a previous agree-ment, it appeared to have been in the contempla-tion of the parties to carry the goods to some port in the united king-dom, and that the ship should carry no license:—  
 Held that this was not an illegal contract, so as to deprive *A.* of his right to his com-mission for pro-curing the char-ter party to be effected.

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master might be ordered and directed. The defendant objected that the voyage, being for the purpose of trading with the *American* states without a license, was illegal, and that therefore the plaintiff could not recover his commission for procuring this charter party to be effected. The plaintiff, on the other hand, contended that, as cotton was one of the articles intended to be imported, the voyage was protected by stat. 43 *Geo.* 3. c. 153. s. 13 (a). The learned judge, without giving any opinion on the subject, directed a verdict for the plaintiff, reserving the point for the consideration of the court.

The *Solicitor-General* and Mr. Serjt. *Marshall*, accordingly, on a former day in this term, moved for a rule to shew cause why the verdict should not be set aside and a new trial granted. The object, they said, of the stat. 43 *Geo.* 3. c. 153., was to relax in some measure the restrictions contained in the navigation act (b), which the king had no authority to do: The intention of the legislature was merely to legalize the importation of certain goods in ships which should belong to states in amity with this

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(a) That act states in its preamble that "by stat. 12 *Car.* 2. c. 18, and "several other acts, the importation of the several goods enumerated "in this act, is prohibited, except under certain regulations; and "that it is expedient to permit, during the continuance of hostilities, the importation of the said goods, under the regulations prescribed in this act." By the 13th section, the clause in question, it is enacted, "That during the continuance of hostilities, and till "six months after the ratification of peace, it shall be lawful for "any person to import into any port or place in *Great Britain*, all "sorts of wool, and into *Ireland*, all sorts of barilla or wool and "cotton wool, from any country or place whatsoever, in any vessel "belonging to any state in amity with his majesty, navigated by "foreign seamen."

(b) 12 *Car.* 2. c. 18., entitled, "an act for the encouraging and "increasing of shipping and navigation;" which (sect. 1.) enacts, "That no goods or commodities whatsoever shall be imported into, "or exported out of, any of the king's plantations in *Asia*, *Africa*, "or *America*, in any but *English* or *Irish* ships, or such as are of "the built of, and belonging to, any of the said plantations, and "whereof the master and three-fourths of the mariners, at least, are "*English*."

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country; but not to sanction the trading with an enemy's country, unless by virtue of a license. They contended, therefore, that the act was to be considered as only affecting the commercial law of the country, and that the laws relating to belligerent states remained unaltered by it. [Lord Chief Justice *Gibbs*.—Could you, at the time this act passed, have brought these goods from a hostile country without a license? I think you could not; and if so, the law respecting states at war with this country *has* been altered.] This statute, they contended, only permitted that to be done by ships of any kind, which by the stat. 12 *Car.* 2. c. 18. could be done by such vessels only as are described in the latter statute, which had nothing to do with war or peace. A rule *nisi* being granted,

Mr. Serjt. *Best* now shewed cause, and contended that the defence intended to be set up could, in no point of view, be supported. He admitted that it was the intention of the parties that the ship should go to *Ireland*, and that she should carry no *British* license; because if she had gone to *America* with a license from this country, she would have been captured. But though it had been so agreed between the freighter and the defendant, it did not follow that the plaintiff, who had only acted as broker in the business, should have known of that agreement; he might have supposed that she was going to any other place. But even admitting that the plaintiff did know that the ship was to come to *Ireland*, and that the voyage to *Ireland* was illegal, he contended that it was no reason for depriving him of his reward, for what he had procured to be done for the ship, that some of the parties had intended to do something illegal.

The *Solicitor-General* and Mr. Serjt. *Marshall*, being called upon to support their rule, contended that, if on the face of the agreement, it appeared that the transac-

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tion was illegal, either by positive law, or on general principles, the plaintiff could not recover. *First*, they insisted that a license, of itself, would not have been sufficient to protect this voyage, except as far as related to trading with the enemy; the navigation act would still have been violated, unless there had been an order in council; for by the 16th sect. of stat. 43 Geo. 3. c. 153., it is enacted, "that goods may be imported from "hostile countries by order in council." Unless, therefore, the plaintiff could have shewn that any such order existed at the time of this transaction, the agreement was in defiance of that act. *Secondly*, the plaintiff, they said, rested his claim on the circumstance of the cargo consisting partly of cotton, which he contended might lawfully be imported under the 13th section; that clause, however, expressly confined the importation of cotton to *Ireland*; whereas it was evident that the *English*, as well as the *Irish* ports were in the contemplation of the parties to the previous agreement, by their making use of the expression "or one port of the united kingdom," and by their excepting *London* from the ports to which the ship was to be consigned. The contract, they contended, must stand or fall, according as the whole of it, when taken together, should be legal or illegal. If a man engaged to do one of two things, at the option of the person with whom he was contracting, and either were illegal, the whole contract was void; for it never could be contended that it was good as to the legal part of it, and bad as to the remainder. The plaintiff should have taken care that the contract into which he was entering, and which on the face of it was illegal, had been legalized by the necessary licenses. No evidence had been given that any steps were taken to legalize it; it remained, therefore, unlawful, and the plaintiff was not entitled to recover any compensation for the part which he had in effecting it.

Lord Chief Justice GIBBS.—Much ingenuity has been exercised to find a support for the most dishonourable defence I ever heard of. The defendant, being owner of a ship, wishes to get her employed in some lucrative trade, and accordingly directs the plaintiff to procure an employment of that kind for her. The plaintiff complies, the ship proceeds on her voyage, and when the plaintiff demands a remuneration, the defendant refuses to comply with the demand, on the ground that that which he himself had directed the plaintiff to do, was illegal: Dishonourable, however, as is this defence, if it be legal, it must prevail. The agreement neither determined what the goods to be imported should be, nor to what port the ship, when laden, should be addressed; both were left in the discretion of the consignors. The defendant insists that, if there be any course of voyage which the owner would be obliged to pursue, if the freighter should elect it, and which, if pursued, would be illegal, the whole contract is void. Without assenting to that proposition, I will assume it for argument's sake: I see no course of voyage prescribed by this agreement, which, if elected by the freighter, the owner would have been obliged to have adopted, and which, if adopted, would have been illegal. It is urged that by stat. 43 Geo. 3. the ship could not go to any ports in *Great Britain*, without a license to dispense with the general law, and also an order in council in compliance with the act. Be it so, *non constat*, but both might have been obtained; and if they have not been obtained, it is the fault, not of the innocent plaintiff, but of the criminal defendant. It is contended that it was in contemplation to bring cotton to *England*, and that that intention was illegal: Without saying whether it were so or not, I am of opinion that the owner could not have been called upon to do so; for it would have been sufficient for him

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to have carried it to any port mentioned in the charter party, to which it might legally have been carried. I therefore see no course of voyage which the owner could have been called upon to perform, which might not have been legalized. It would have been too much for the plaintiff to have been obliged to watch over the execution of the contract, and to see that nothing illegal was done on it. It was sufficient for him that the contract was legal on the face of it, and no subsequent transaction between other parties could vitiate it as to him.

The rest of the court concurred,

And the rule was discharged.

Tuesday,
 May 10.

FIDGEON and others, assignees of **BECHER** and **BARKER**,
v. **SHARP.**

A. purchases goods of *B.* on October 8, for the purpose of exportation; but finding that he must stop payment, and that he cannot apply the goods to the purpose for which they were bought, he returns them to *B.* on October 16. On the 17th he stops payment, but expecting remittances from abroad more than sufficient to pay his debts, has no doubt but his creditors will give him time. They, however, refusing, he is made bankrupt on November 2.—In an action by the assignees against *B.* for the value of the goods, held that the jury were warranted in finding that the delivery of the goods to *B.* was not made in contemplation of bankruptcy.

THIS was an action of trover, brought by the assignees of *Becher* and *Barker*, bankrupts, to recover the value of a quantity of goods, which had been sold by the defendant to *Becher* and *Barker*, and which had been returned by the latter to the defendant, in contemplation, as the plaintiffs contended, of bankruptcy. At the trial of the cause, at the sittings after last *Hilary* term, before Lord Chief Justice *Gibbs*, at *Guildhall*, it appeared from the testimony of one of the bankrupts, that they had purchased the goods in question of the defendant, as agent for *Taylor & Co.*, on the 8th of Oct. 1812; that on the 16th of the same month, finding that

they should be obliged to suspend payment, and that they should be unable to apply these goods to the purpose for which they had purchased them, viz. for exportation to *Russia*, they determined to return them to the defendant, which was accordingly done; that on the next day, the 17th of *Oct.* they stopped payment; but that, so far from contemplating bankruptcy, they expected an overplus of £17,000 from the return of an adventure in *Russia*, which had been delayed by the backwardness of their correspondents there; and that they had no doubt at this period, but that their creditors would have given them time. In that expectation, however, they were disappointed, owing to some disagreement among the creditors. The act of bankruptcy was committed on the 29th of *October*, and the commission issued on the 2d of *November* following.

Mr. Serjt. *Best* made a previous question, whether this action would lie against the defendant, who had sold the goods merely as agent for *Taylor & Co.* That objection, however, being overruled by the Chief Justice, he contended that, though Lord *Ellenborough*, on several occasions, had said that the law relating to the contemplation of bankruptcy had been carried too far, yet it had never been extended to such a length as to embrace the present case. The fraud, which was necessary to support this action, he said, must consist in the *bankrupt's* contemplation of his failure, not in that of his creditors. In this case, the bankrupts had stated that, though they expected to be obliged to suspend payment, they had no idea of becoming bankrupts: If, therefore, the plaintiffs should recover in this action, the most respectable merchants, who should suspend payment for a single day, which frequently was the case in houses perfectly solvent, would be said to have bankruptcy in their contemplation.

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The Chief Justice, in giving his direction to the jury, after stating the principles of the law respecting the disposition of property in contemplation of bankruptcy, observed that, as no act of bankruptcy had been committed before the property was delivered back to the defendant, this was not the case of a man disposing of property which had vested in assignees; the only question was, whether *Becher* and *Barker* had disposed of the property in fraudulent preference of one creditor to the detriment of the rest. This, however, his lordship said, had always been confined to the payment of money, or the delivery of goods, in contemplation of bankruptcy; such payment or delivery in the expectation of insolvency only, would not be an illegal act, because it was only from the bankrupt laws, the policy of which was that all the creditors should be paid alike, that the illegality arose. His lordship concurred in the opinion of Lord *Ellenborough*, that this doctrine had been carried full far enough, and observed, that as the bankrupt laws had determined what acts should amount to acts of bankruptcy, it might have been as well to have left all other acts to the construction of the common law of the land. It had, however, too long and too often been decided that the delivery of goods, in order to give a preference to one creditor, was illegal, to be now disputed; the question, therefore, for the jury was, whether the delivery in the present case were in contemplation of bankruptcy, and they would consider how far the knowledge of a temporary suspension of payment was evidence of such contemplation. There was no doubt but the bankrupts intended, from honourable motives, to give a preference to the defendant; but the question was, whether in so doing, they had practised a legal fraud on the bankrupt laws; that is, whether it were in contemplation of becoming bankrupts. Under this direction,

the jury found a verdict for the defendant, on the ground that the bankrupts neither contemplated bankruptcy, nor insolvency.

The *Solicitor-General* and Mr. Serjt. *Lens*, on a former day in this term, moved that this verdict should be set aside and a new trial granted, contending that the facts proved by the bankrupt amounted, in point of law, to a contemplation of bankruptcy; for though they might have had property in *Russia*, sufficient to answer the demands upon them, yet they knew that if it did not arrive, (and they did not expect that it would, at least for some time) they must either have time given them by their creditors, or become bankrupts. It was not necessary, they said, that the trader should be absolutely certain of becoming bankrupt; for if he felt a probability of it, and under that impression he returned the goods, that was as much within the policy of the bankrupt laws, as if he had been morally convinced of it. The court granted a rule *nisi*; and on this day,

Mr. Serjt. *Best* and Mr. Serjt. *Vaughan* shewed cause against it. They cited *Smith v. Payne* (a), to shew that this was a question entirely for the consideration of the jury, and *Hartshorn v. Slodden* (b), where Lord *Alvanley*, and the other learned judges of this court, discussed very fully the law on this subject. It was by no means sufficient, they contended, that *Becher* and *Barker* contemplated insolvency at the time of the redelivery; and there must have been a probability in their minds of their shortly being in such a situation that the bankrupt laws would interfere with the disposition which they were then making of their property; and that disposition must have been made with a view of evading the regulations of the bankrupt laws.

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(a) 6 T. R. 152.—(b) 2 B. and P. 582.

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The *Solicitor-General* and Mr. Serjt. *Leys*, *contra*, said it was very difficult in questions of this sort, to cite cases immediately applicable; the law could only be collected from general principles. It was necessary, to entitle the plaintiffs to recover, that the defendant should have received the whole of his debt, or a greater part of it than he would have got under the commission, and also that that payment should have been made in contemplation of bankruptcy; but there was no necessity that there should have been an absolute fraud, in the moral sense of the word; it was sufficient if the transaction had operated *quasi a disappointment* of the bankrupt laws. Neither, they contended, was it necessary that *Becher* and *Barker* should have considered bankruptcy as the necessary and infallible consequence of the state of their circumstances; it was enough if they knew that bankruptcy must ensue, unless their creditors would give them time. They hoped, and perhaps expected indulgence on the part of their creditors; but that very *hope, ex vi termini*, supposed the probability of the contrary event, and therefore could not but form a strong presumption that bankruptcy was in their contemplation. The jury must have found their verdict on the ground that *Becher* and *Barker* had not *intended* to become bankrupts; confounding the intention of actually committing an act of bankruptcy, with the contemplation of a commission issuing against them *in invitato*. The act of sending back these goods, they contended, was the same as if they had paid half their debts, to the exclusion of the other half. [Mr. Justice *Heath*.—You must consider that they were unable to apply these goods to the purpose for which they were bought, and they might have been damaged by remaining on their hands; their returning them, therefore, was not like paying any other debt.] The *jus disponendi*, they said, was only a right to dispose of their property in the way of their business;

and their neglecting so to apply the goods in question, was a proof that they contemplated the probability of their trade being put an end to. The intention of the bankrupt laws was, that from the moment a man's trade ceases to be a security to his creditors, his right to dispose of his property shall cease.

Lord Chief Justice GIBBS, after recapitulating the circumstances of the case, delivered his opinion thus. The defendant's claim to retain these goods is impeached on the ground that, though they were delivered back to him before the bankruptcy, yet it was under circumstances which rendered the delivery fraudulent and void. I desired the jury to consider whether the bankrupts had bankruptcy or insolvency in their contemplation, purposely distinguishing the two, because, in some cases, the question has been put as if insolvency necessarily supposed bankruptcy. I wish always to abstain from deciding any points which are not absolutely before the court, and therefore, as the jury have found that the bankrupts had neither insolvency, nor bankruptcy in their contemplation, at the time they returned the goods, it will be unnecessary for me to say whether the expectation of the former would have rendered that transaction illegal. But it is contended that, notwithstanding this verdict, the evidence raised a necessary inference that they had bankruptcy in their contemplation, and that the plaintiffs are entitled to a new trial, because the facts of the case can lead to no other conclusion. It is said that if a man, with the consciousness that, without indulgence from his creditors, he shall not be able to go on with his trade, return goods to the person from whom he purchased them, that must be done in contemplation of bankruptcy. I cannot concur in that conclusion. The court has always great difficulty in these cases, because the law is not specifically laid down in any statute. The

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general principle of the bankrupt laws is, that all which is done before the act of bankruptcy is legal; a class of cases, however, has decided that certain acts are in fraud of the bankrupt laws, though committed before the act of bankruptcy; and the only way to decide whether a particular case fall within that doctrine, is to look at the grounds on which these cases appear to have been decided. In *Fordyce's* case (a), and all the other decisions on the subject, down to the present time, it has been held that the payment or delivery must be in fraud of the bankrupt laws, and with a view of giving a preference to one creditor, which these laws will not allow of. Not only, therefore, must such payment or delivery have a tendency to contravene the bankrupt laws, but it must have been made with that view. The latter point must be a question for the jury to determine, and I therefore left it to their consideration, whether bankruptcy were in the contemplation of these parties at the time of this transaction. They expressly said, that neither bankruptcy nor insolvency was in the minds of *Becher* and *Barker* at that time. Then was there evidence to support this verdict? The bankrupts, it is true, found that they must suspend their payments, and that, unless they received indulgence from their creditors, they should be unable to go on with their business: But *Becher* also stated, that they had a surplus in *Russia*, and that in the end they should be able to satisfy all their creditors; if, therefore, their motive for returning the goods were as they stated, and were not a mere pretext, it cannot be contended that it was done in contemplation of bankruptcy. How then can it be said that the verdict stands so unsupported by evidence as to

(a) *Harman* and others, assignees of *Fordyce*, v. *Fisher*. 1 Cowp. 117.

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warrant us in granting a new trial. I must beg leave to observe, that in the case of *Hartshorn v. Slodden*, which has been cited by the defendant, the judges stated the law on this subject most correctly, and they all agree that *bankruptcy* must be in the contemplation of the parties, adopting the principles laid down by Lord Mansfield in *Fordyce's* case. Not that I altogether exclude from my consideration the question of insolvency; but though it may be a strong presumption, it still is but a step towards the contemplation of bankruptcy.

Mr. Justice HEATH.—I am of the same opinion. There not only appears to have been no contemplation of bankruptcy in this case, but the circumstances were such, that no reasonable person could have supposed that event to be probable.

Mr. Justice CHAMBRE.—This question was properly left to the jury, and I am very far from questioning the propriety of their decision. The goods were purchased for a trade which *Becher* and *Barker* found they could not prosecute for some time, and they therefore resolved to return the goods, rather than keep them unemployed in their hands. They expected to be able to satisfy all the demands upon them, and had no doubt of receiving time from their creditors for that purpose; and that expectation was not without foundation, because there was a large surplus of money due to them from *Russia*. What reason then is there for saying that they contemplated bankruptcy, or had any intention of putting the defendant in a better situation than that of the other creditors? For that has always been the object of the bankrupt in those cases, where a contemplation of bankruptcy has been supposed to exist.

Mr. Justice DALLAS.—There are three questions in this case: *First*, whether this were a subject proper to be

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left to the consideration of the jury; *secondly*, whether it were properly left to them in point of direction; and *thirdly*, whether the verdict be supported by the evidence. As to the *first*, it is not contended that this was not a case fit to go to a jury, as a mixed question of law and fact. With regard to the *second*, I concur with his lordship's opinion, that in all these cases, the question is whether the payment or delivery were in contemplation of bankruptcy. In the present case, the jury have gone a step further, and have found that the bankrupts had contemplated neither bankruptcy nor insolvency. *Lastly*, I am of opinion that this verdict was fully supported by the evidence, and that, if I had been in their situation, I should have drawn the same conclusion. A man may be under temporary difficulties, and yet not stop payment; he may suspend his payments, and yet not be in a state of total insolvency; and he may be insolvent, and yet not become bankrupt. On no ground, therefore, do I think there is any reason for granting a new trial.

Rule discharged.

Monday,
 May 9.

SCOTLAND v. WILSON and another.

Goods carried from a port in *Scotland*, to a port in *England*, are not to be considered as exported, so as to make it necessary to have the bill of lading stamped.

THIS action was brought to recover the sum of £12: 12s. for four days demurrage of the sloop *Janet*, belonging to the plaintiff, which was hired by the defendants to carry a cargo of timber from *Grangemouth* to *Berwick*, and there to take in a cargo of oats for *London*. At the trial of the cause at the sittings in last *Hilary* term, before Mr. Justice *Heath*, at *Guildhall*, the plaintiff offered

to give in evidence the bill of lading dated at *Berwick*, under which the defendants, in *London*, had received the cargo from *Berwick*. That instrument, however, being without a stamp, Mr. Serjt. *Vaughan*, for the defendants, objected that it was inadmissible; and Mr. Justice *Heath* being of the same opinion, on the ground that the word "*exported*," in the stamp act (a), embraced the present case, directed the plaintiff to be nonsuited, with liberty to move to set it aside, and enter a verdict for £12: 12s., if the court should be of opinion that a stamp was not necessary.

The *Solicitor-General*, in *Hilary* term, moved accordingly, and contended that the words "goods, &c. to be exported," must be taken to mean goods to be carried from this country to parts beyond the seas, not such as should be merely carried coastwise, from one part of the kingdom to another, as in the present case. He referred to stat. 31 *Geo. 3. c. 30*, to shew that the term exportation necessarily implies the carrying goods to parts beyond the seas. So in stat. 27 *Geo. 3. c. 13*, in the title to schedule A., a distinction is taken between goods exported, and such as should be carried coastwise. [Mr. Justice *Heath*.—But those acts relate to drawbacks, and that distinction must be made in the case of drawbacks.] The rule *nisi* being granted,

Mr. Serjt. *Vaughan* now shewed cause, and contended that there was nothing in the 48th *Geo. 3.* to entitle the plaintiff to put so narrow a construction upon it. Those words of the act on which the question turned must be understood as applying to all goods, for which it was necessary to take out a clearance.

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(a) 48 *Geo. 3. c. 149. Schedule*, part 1. "BILL OF LADING, of
"or for any goods, merchandize, or effects, to be exported;" *Ol. 3s. 0d.*

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[Lord Chief Justice *Gibbs*.—The word clearance has no meaning: Indeed, there is no such thing as a clearance; the only thing which I can consider as such, is the last document which the ship receives before she leaves the port. It would occasion great confusion if every little coaster were obliged to carry a bill of lading. Indeed, I think it is very doubtful whether the shipping-note, which they usually deliver, can be considered as a bill of lading. If it were necessary for every vessel clearing out of port to have her bill of lading stamped, the act would have said generally that all bills of lading must be stamped, and would not have made use of the qualification “for any goods *to be exported*.” There may be a question whether goods brought, as in this case, from *Scotland to England*, be goods carried coastwise, or exported.]

The *Solicitor-General* insisted that there could be no doubt in this question, because the stat. 27 Geo. 3. c. 13., above alluded to, mentioned goods *brought or carried coastwise*, or, *from port to port within the kingdom of Great Britain*, as convertible terms; and this, he said, was further elucidated by stat. 32 Geo. 3, c. 50, by which it is enacted “that goods may be conveyed from one port “in *Great Britain* to another, without cocquet or security, “provided that no goods, *so to be carried coastwise*, shall “exceed £5, &c.”

Lord Chief Justice GIBBS.—There is no answering this.

Per Curiam,

Rule absolute.

CARSTAIRS and others, assignees of KENSINGTON and
CO. V. ROLLESTON and others.

Wednesday,
May 11.

THE plaintiffs declared as assignees of the estate and effects of *Kensington and Co.*, bankrupts, on a promissory note, dated the 28th of *April* 1803, by which the defendants promised to pay on demand, to the order of one *Christopher Rolleston junior*, the sum of £5000, value received, in his the said *Christopher Rolleston junior's* assignment to the defendants of the *Granton* estate, in *Grenada*. The declaration further stated that *Christopher Rolleston junior*, indorsed it to the bankrupts before the bankruptcy, of which indorsement the defendants had notice.—Plea: *First*, the general issue; *secondly*, that the defendants drew the note as sureties only for *Christopher Rolleston junior*, and without any consideration; *thirdly*, that the note was drawn by the defendants as sureties only, and not on their own account, and that after the making of the note, and before the bankruptcy, viz. on the 3d of *July* 1807, the bankrupts, by their certain writing of release, sealed with their seals, “remised, released, and for ever quitted claim to the said *Christopher Rolleston junior*, of the said note, and all claim and demand, cause and causes of action in respect thereof, and all claim and demand whatever, for, touching, or relating to the matters and circumstances, for and in respect of which the several promises and undertakings in the declaration mentioned were made, and all sum or sums of money due, or to become due, for, touching, or relating to the same, up to the time of making and executing the said release;” and concluded with a verification.—To this plea the plaintiffs

To an action by the indorsees of a promissory note against the drawer, the defendant pleaded that he drew the note as surety only for the payee, and that the plaintiff had released the payee from all claim in respect of the said note; without alleging that the plaintiff had notice of the want of consideration between the defendant and payee. Held, that the release did not operate as an extinguishment of the consideration which the plaintiff had given to the payee for the note, so as to make it a note without consideration between himself and the defendant, and therefore that the plea was bad on general demurrer.

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demurred generally, the defendants joined in demurrer, and on this day it came on for argument.

Mr. Serjt. *Lens*, in support of the demurrer, observed, that the only question would be, whether the release to *Christopher Rolleston*, the payee, were a discharge to the defendants, who were the makers of the note; for though the plea alleged that the defendants had drawn the bill merely as sureties for *Christopher*, without any consideration; yet, as it only alleged the simple fact, without stating that those who received the bill had had notice of the circumstance, that part of the defence could not come in question:— After the note had been sent into the world, the holders of it could not be affected by the private relations which might exist between the original parties to it. As to the only question, then, that remained, he said it was perfectly settled that the discharge of one party to a promissory note, or bill of exchange, left the other parties in the same condition, at least those who were prior to the party discharged. In the present case, the release of the payee could not be said to act as a discharge of the defendants, who as drawers, he contended, were the first and last persons liable, in the same manner as if they had been the acceptors of a bill of exchange; and who, therefore, could only relieve themselves by shewing, either that they had paid the bill, or had had a release to themselves. He cited *Fentum v. Pocock* (a), where this court held that the acceptor of an accommodation bill was not discharged by the holder taking a cognovit from the drawer; and he contended that the two cases were substantially the same, the cognovit in the case cited answering to the release in the present instance.—[Lord Chief Justice

(a) *Suprà*, 14.

Gibbs.—There was no notice given of the want of consideration; I should therefore like to hear how this plea can be supported.]

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Mr. Serjt. *Blosset* insisted that the release, by the very terms of it, was a discharge, not only of the action on the note, but also of the debt, in consideration of which the note had been passed to the bankrupts. It appeared on record that, as between themselves, the drawers were only sureties for the payee, and therefore, if the matter had rested there, it could not have been contended that the drawer could have sued the defendants: The payee, however, indorsed the note for a valuable consideration to the bankrupts, in consequence of which, a right of action arose against the drawers; and he admitted that the want of consideration between the original parties, could not be set up as a defence to the bankrupt's claim against the drawers: But he contended that the subsequent release to the payee made it the case of a note without consideration, even as between the plaintiffs and the defendants; for as the defendants could not have been sued by *Rolleston*, neither were they liable to any one standing in *Rolleston's* place; that is, to any one who had not given consideration for the instrument; and by the release, not only the action on the note was taken away, but the consideration which the bankrupts had given for it was also destroyed. He admitted that the bare release of the bankrupt's right of action against the payee, would not release a prior party to the instrument, but the bankrupts having "released and quitted" claim to *Rolleston* of the said note, and all claim and "cause of action in respect thereof, and all claim relating to the matters in respect of which the several" promises in the declaration were made, and all money "due, or to become due, for the same, up to the time of" making the release," he contended that this would

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have been a relinquishment of the bankrupt's right of action for goods sold, money lent, or any other cause whatever; and the note, therefore, was to be considered as having been indorsed without consideration: The question, therefore, was, whether the indorsee of a promissory note could recover against the drawer, the note having been indorsed without consideration.

Mr. Serjt. *Lens*, in reply, was stopped by the court.

Lord Chief Justice GIBBS.—This case has been argued on the only ground on which it could be supported for a moment, and ingenuity has furnished an argument which I had not discovered. The object of the defendants was to accommodate the payee, and I admit that the payee could not have sued the makers of the note; nor could an indorsee have done so, unless he had given consideration for it:—But it is insisted that the release which has been given by the bankrupts, who were indorsees, to the original payee, operates as an extinguishment of the consideration which they gave for it, and therefore puts them in the condition of indorsees without consideration.—I am not of that opinion; the indorsement was for a valuable consideration, and the indorsees had the security of the defendants, as makers of the note, for their debt; and though they released the original payee, they still retain their remedy against the drawers. Whatever might have been the case, if the bankrupts had had notice that the instrument was given originally without consideration, as to which I give no opinion, I am decided that, as the matter now stands, the plaintiff's right of action remains against the defendants.

The rest of the court concurred in the opinion of the Chief Justice.

Judgment for the plaintiffs.

BURROUGHS v. STEPHENS and others, executors of
ELTON.

Saturday,
May 14.

THE *Solicitor-General*, on a former day in this term, moved for a rule *nisi* in this cause, which was an action against the executors of *George Elton*, on a bond given by the testator in his lifetime, to amend the judgment-roll by striking out the words *thirteen pounds four shillings of the damages aforesaid*, interlined on the said roll, and by inserting the christian name of one of the defendants which had been omitted in the *misericordia*, at the end of the judgment. He moved on an affidavit which stated that the plaintiff declared in *Hilary* term 1808; that the defendants in the same term pleaded a judgment recovered against them on the same bond; but that, on being ruled to produce the record of the judgment so pleaded, the defendants made default therein, and judgment was signed against them in this action on the 12th of *May*, 1808;—that in the entry on the roll of the judgment in this cause, the words above mentioned appeared to have been interlined since the entry was originally made. The entry, as it now appeared, was “that the plaintiff do recover against the defendants, “as executors as aforesaid, his said debt, and also £13: 4s. “for his damages and costs, to be levied of the goods “and chattels which were of the testator at the time of “his death in the hands of the defendants to be administered, if they have so much, &c.; and if they have “not so much in their hands to be administered, then “*thirteen pounds four shillings of the damages aforesaid* to “be levied of the proper goods and chattels of the defendants, &c.” The words in *italicks* had been interlined, and were the words which the *Solicitor-General*

Where an executor pleads a false plea of judgment recovered against himself, on which judgment is entered up against him for the debt and damages *de bonis testatoris, et si non, de bonis propriis*, and words are afterwards interlined on the judgment roll, by which the judgment *de bonis propriis* is confined to the damages only:—The court will not, on motion, strike out the words which had been interlined, it not appearing by whom the interlineation had been made, and the judgment being of six years standing.

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had moved for leave to strike out. He contended that the judgment, as it originally stood, being *de bonis propriis* for the whole of the debt and costs, was correct where an executor pleaded a plea which was false within his own knowledge; and it was evidently so in the present instance, because the defendants had pleaded a judgment recovered against themselves. The cases on this subject, he said, were fully collected in 1st *Williams's Saunders*, 336 (a). [Lord Chief Justice Gibbs.—If an executor plead a fact which is false within his own knowledge, the judgment should certainly be *de bonis propriis*; but that is a very questionable point, and we are called upon here to decide it on a collateral motion, and that too on a judgment of very long standing. How do we know that the alteration was not made by your client?] The court, however, granted a rule *nisi*, and on this day

Mr. Serjt. *Lens* shewed cause against it. He contended that the court would only permit this amendment on the ground that it was a misprision of the clerk, or that there was reason to suppose that the defendants had altered it fraudulently; the plaintiff therefore should have stated that it was done fraudulently or carelessly, and that it was not the act of himself or of his attorney.

The *Solicitor-General contra*, said that his client did not know by whom the judgment had been entered up; but he contended that, where the judgment had been entered up wrong, the court would not enquire by whose hand it had been so entered. He cited the case

(a) *Note* (10). Towards the conclusion of that note, it is said that, "when the defendant pleads *ne unques executor, or administrator, or a release to himself*, and it is found against him, the judgment is that the plaintiff do recover both the debt and costs, in the first place, *de bonis testatoris, si, &c. et si non, &c. de bonis propriis*. The reason alleged is, because the executor cannot but know these to be false pleas. But the same reason seems equally to apply to other pleas, where the judgment is different."

of *Green v. Rennet* (a), where, on a rule to amend a bill of *Middlesex*, Mr. Justice *Buller*, comparing it to the case of an executor, said that, "if the clerk enter judgment *de bonis propriis* instead of *de bonis testatoris*, and error be brought, the court will order the entry to be amended, even if the record be sent back from the "exchequer chamber." [Lord Chief Justice *Gibbs*.—Have you found any case where a judgment *de bonis testatoris* has been altered to a judgment *de bonis propriis*?] The *Solicitor-General* admitted that he had no express authority to adduce, but contended that, on principle, the amendment might be allowed in the one case as well as in the other.

Lord Chief Justice *GIBBS*.—It is very difficult to determine what is a plea necessarily false within the knowledge of an executor. There are many pleas which a person unskilled in the law would say the person pleading them must know to be true or false, when, in fact, the question might be very doubtful; as, for instance, *plene administravit*. The court then is called upon to exercise their authority, by amending a judgment of six years standing, on a question which is of so doubtful a nature. At all events, it is discretionary in the court, and I think they will not be inclined, at this distance of time, to grant an amendment on mere motion, by which the responsibility of the executors would be so much increased.

The rest of the court concurred, and the rule was accordingly discharged, as to this part of it, and made absolute as to the insertion of the christian name, to which there was no opposition.

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BURROUGHS
v.
STEPHENS.

(a) 1 T. R. 792.

Tuesday, May 17.

WAUGH and others, administrators of PHILLIPS, v.
BUSSELL.

To an action of debt on bond, the defendant prayedoyer of the condition, which was "for the payment of 100*l*. by instalments, till the said sum of 100*l*. be paid;" and then pleaded *non est factum*. The word *hundred* had been omitted in the second place where it occurs in the condition, and was afterwards inserted without the defendant's knowledge:—Held, that though this alteration did not avoid the instrument, yet it made such a variance between the oyer and the condition, as precluded the plaintiff from recovering.

THE plaintiffs declared as administrators of *Elizabeth Phillips*, against the defendant, as obligor of a bond for £200, given by him to the intestate in her lifetime. The defendant cravedoyer of the bond and of the condition, which was, that the defendant should pay to the intestate the sum of £100, by six equal payments, viz. the sum of £16 : 13*s*. : 4*d*. each year, until the full sum of £100 should be paid; and then pleaded *non est factum*. The plaintiffs joined issue on that plea, and assigned for breach, that the first instalment of the said sum of £100 had become due and in arrear. At the trial of the cause at the sittings after last *Hilary* term, at *Guildhall*, before Mr. Justice *Chambre*, it was proved by the subscribing witness to the bond, that the word *hundred*, in the second place where it occurs in the condition, had been interlined, since the instrument was executed, by the person who drew it up, without the knowledge of the defendant, and while it was in the custody of the intestate; so that the passage, before the interlineation was made, stood thus: "Until the full sum of *one pounds* is paid." Mr. Serjt. *Best*, on the part of the defendant, made two objections: *First*, that the instrument itself became void by this interlineation; *secondly*, that there was a variance between the condition, and the statement of it in the oyer: He contended that it ought to have been set out without the word *hundred*. The learned judge was inclined to be of opinion, that if the interlineation had not been made, the plaintiff might have recovered, notwithstanding the omission of the word *hundred*; but he considered that the effect of the interlineation was to render the instru-

ment no longer the bond of the defendant; and he accordingly directed the plaintiff to be nonsuited.

Mr. Serjt. *Vaughan*, on a former day in this term, moved to set aside this nonsuit. As to the first objection, he admitted that, if the alteration had been in a material part of the instrument, and had been made by the obligee, the bond would have been vitiated; having been made by a stranger, it did not affect the instrument, whether it were in a material or immaterial part of it. He contended, however, that the substantial part of the condition was that the sum of £100 should be paid by four equal instalments; and that the subsequent clause, "till the sum of one (hundred) pounds was paid," was perfectly immaterial; especially as this was an action for the first instalment. He cited *Com. Dig. tit. Fait. (F. 1.)* "An alteration by a stranger, in a place not material, without the privity of the obligee, does not avoid the deed. 11 Co. 27. a." *Secondly*, as to this being a variance between the bond and the oyer, he contended that it had only made intelligible that which was before nonsense; it was only reading the passage as it was necessary that it should be read, in order to be consistent with the former part of the condition. [Mr. Justice *Chambre*.—There was a case before the judges on a criminal prosecution, where the question was on a note for *twenty pound*, which might mean pound weight; and the judges were of opinion that it ought to have been declared upon as meaning £20 in money.] A rule *nisi* was granted.

Mr. Serjt. *Best* on this day shewed cause, and contended that the alteration was in a material part of the instrument, and that this case therefore did not fall within the rule laid down in *Com. Dig.* as above referred to. As the bond stood originally, the defendant would be discharged on payment of £1. [Lord Chief Justice *Gibbs*.—According to that, the condition would be that

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the defendant should go on paying £16 : 13s. : 4d., until £1 should be paid.] *Secondly*, then, he insisted that there was a variance between the bond and the oyer; the instrument produced had not proved that which had been set out.

Mr. Serjt. *Vaughan*, *contra*, as to the second objection, the first having been overruled, cited *Halman v. Borough* (a), where, in an action of covenant, the declaration set forth the deed with the year of our Lord and the year of the reign; the oyer stated the former only; the court on demurrer held it no variance, because it was *implicitly* in the deed. So in the present case, the word *hundred* was impliedly in the deed, because that sum was mentioned in the former part of the condition; and the passage was nonsense without it. In *Roberts v. Harnage* (b), which was an action of debt on bond, the plaintiff declared that the defendant was bound to the plaintiff in £40, to be paid to the plaintiff: On oyer, it appeared that the bond was to the plaintiff to pay £40 to his attorney or his assigns; the court held that this was no variance, because payment to the plaintiff, or to his attorney, was the same thing. [Lord Chief Justice Gibbs.—The question there was, whether the oyer supported the averment in the declaration; and the court held that the instrument was stated in effect in the declaration; in the present case, the question is whether the oyer be supported by the evidence. So in the first case cited, the question was between the declaration and the oyer, and came on on demurrer. There is this difference between the present case, and those cited; in the latter, the declaration might have been good, and yet have not contained a single word which was in the bonds; but the case is very dif-

(a) *Salk.* 658.—(b) *Ib.* 659.

ferent where *non est factum* is pleaded.] The principles, he said, on which those cases were decided, were the same as that for which he now contended, viz. that the bond was the same if not *substantially* different. He then cited *Com. Dig. tit. Obligation (B. 4)*. "So, a small variance between the obligation upon oyer, and the declaration does not avoid it; as, if the declaration be upon a bill *that he will pay, &c.*; and the bill says, *if he pay, &c. 3 Lev. 66.*" In order to support this objection, the defendant must establish the principle, that whenever oyer is prayed, the slightest literal alteration will be fatal.

Lord Chief Justice GIBBS.—When you declare on a deed, you state the legal effect of it; and, as I said before, one might declare without using a word which is contained in the deed, except the names of the parties and the sum. The defendant, by his plea, asks to look at the instrument, by which the plaintiff alleges that he is bound. It is necessary then, not merely to shew the legal effect, but the very words by which the defendant is bound; and that makes the distinction between the case where the oyer and declaration disagree, and where the statement in the oyer is not supported by the deed itself. You can cite no case where it has been held that a variance between the deed and the oyer is not fatal; the court, therefore, cannot assist you. You had your remedy in your own hands, for you might have explained the mistake by averments.

The rest of the court concurring, the rule was

Discharged.

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Wednesday,
May 18.

WORCESTERSHIRE AND STAFFORDSHIRE CANAL COMPANY,
v. the TRENT and MERSEY NAVIGATION COMPANY.

A defendant cannot go to trial by *proviso*, unless there have been a default on the part of the plaintiff, though there have been a former trial, and though the defendant gave notice to the plaintiff of his intention to carry down the record.

THIS cause had been twice carried down to the assizes for trial, and the plaintiffs were each time nonsuited; but the court had each time set aside the nonsuit and granted a new trial, on the ground that the facts were not sufficiently before the court; and in order that, if necessary, a case might be made for the opinion of the court. Previously to the last assizes, the defendants, though there had been no default on the part of the plaintiffs, gave the latter notice that they should take the record down by *proviso*. The plaintiffs refused to accept this notice; the defendants, however, carried down the record, and the plaintiffs, not appearing, were nonsuited.

The *Solicitor-General*, on the first day of this term, moved that this nonsuit should be set aside and a new trial granted. The general rule, he said, was that the defendant had no right to carry a cause down by *proviso*, until the plaintiff had been guilty of some default (a); and this applied equally to cases where there had been a former trial, as to other cases. The defendants would rely on the case of *Humpage v. Rowley* (b), where the court permitted the defendant to carry the record of an issue which had been directed by the court of chancery, down to trial, on his suggestion that the plaintiff wished to delay it. He distinguished that case from the present, by the circumstance of its being an issue out of chancery. A rule *nisi* was accordingly granted, and on this day

Mr. Serjt. *Lens* and Mr. Serjt. *Best* shewed cause

(a) *R. M.* 1654. *Salk.* 652.—(b) 4 *T. R.* 767.

against it. They contended that, as it had been held that the stat. 14 Geo. 2. c. 17. which enables the courts to give judgment for the defendant as in case of a nonsuit, where the plaintiff neglects to go to trial, according to the practice of the court, did not extend to cases where there had been a former trial, but that the defendant must proceed to trial by *proviso* (a), it was not necessary in such case that there should have been any default on the part of the plaintiff. In the present case, the plaintiff had not been taken by surprise, for he had had notice of the defendant's intention; unless, therefore, there had been an established practice applicable to the present case, this nonsuit could not be set aside.

Lord Chief Justice GIBBS.—I take the general rule to be perfectly established; that the defendant cannot carry a cause down by *proviso*, till there has been a default on the part of the plaintiff. The only case in the slightest degree resembling the present, is that of *Humpage v. Rowley*; but that would be applicable to all other cases as much as to this; and if we were to suffer this nonsuit to stand, any defendant might carry the record down by *proviso* at any time. It is true that judgment as in case of a nonsuit could not have been granted in this case; but it does not follow from that, that the defendant may carry the cause to trial, without any default by the plaintiff.

The rest of the court concurring,

Rule absolute.

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WORCESTER-
SHIRE CANAL
COMPANY
v.
THE TRENT
NAVIGATION
COMPANY.

(a) *King v. Pippett*, 1 T. R. 492. *Mowburn v. Langley*, 3 T. R. 1. *Porzeñius v. Maddocks*, 1 H. B. 101.

Friday, May 20.

BURLEY v. BETHUNE.

In an action against a magistrate for a malicious conviction, it is not sufficient for the plaintiff to shew that he was innocent of the offence of which he was convicted; but he must also prove, from what passed before the magistrate, that there was a want of probable cause.

THIS was an action on the case, and was brought against the defendant, a magistrate of the county of *Surrey*, for convicting the plaintiff maliciously and without any probable cause (*a*) of being a rogue and vagabond, in leaving his wife and family, whereby they became chargeable to the parish; in consequence of which conviction, the plaintiff was imprisoned for the space of seven months, until he was carried by writ of *habeas corpus* to the court of *King's Bench*, and by that court released and discharged. The defendant pleaded, *first*, the general issue; *secondly*, that after the committing the supposed grievances, and before the commencement of this suit, and within one month after notice of any writ or process intended to be brought against him by the plaintiff, he, the defendant, tendered to the plaintiff's attorney the sum of two-pence, as amends for the said grievances, and twenty shillings for the preparing and serving such notice; which said sum of two-pence was sufficient amends for the said supposed grievances. The plaintiff replied that the said sum of two-pence was wholly insufficient, and on this point issue was taken. At the trial of the cause before the Lord Chief Baron, at the last assizes for the county of *Surrey*, the plaintiff proved that his wife had eloped from his house twelve months before the conviction, and

(a) *Stat. 43 Geo. 3. c. 141.* enacts, "that in all actions against justices of the peace, on account of any conviction before them, in case such conviction shall be quashed, the plaintiffs shall not recover more than two-pence, besides the penalties which may have been levied upon them; nor any costs of suit, unless it be expressly alleged in the declaration in such action, which shall be an action on the case only, that it was done maliciously and without any reasonable or probable cause."

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had during that time been living in adultery; and that his only child, a daughter, had constantly lived with him, and was in fact living with him at the time of the conviction. The defendant objected that, though this might prove the plaintiff to be innocent of the offence with which he had been charged, it was no evidence of malice on the part of the defendant: There might have been sufficient ground for the conviction, though it rested on false testimony. The Chief Baron, being of the same opinion, and considering that the 43 *Geo. 3.* placed these actions on the same footing as those for malicious prosecutions, directed the plaintiff to be nonsuited, on the authority of *Purcell v. Macnamara* (a). A rule *nisi* had been obtained on a former day in this term, that the nonsuit should be set aside and a new trial granted; and on this day Mr. Serjt. *Vaughan* was to have shewn cause against the rule, but was stopped by the court, who called on the other side.

Mr. Serjt. *Best* and Mr. Serjt. *Onslow*, in support of the rule, contended that the plaintiff had proved all that it was necessary or possible for him to prove. He had shewn that, in point of fact, he was not a rogue or vagabond; it was therefore incumbent on the defendant to shew by what passed before him, that there was reasonable ground for the conviction, which he might have done by producing his depositions, or by calling those who were present at the examination, but which the plaintiff had no opportunity of doing. The act, it was true, required that the declaration should allege malice and want of probable cause; but if it were necessary for the plaintiff to prove this, the act would become a sanction for magistrates to commit any injustice they might think proper; and however flagrant their conduct might

(a) 9 *East*. 361.

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be, it would be impossible for the injured party to obtain redress. The intention, however, of the legislature was only "to render justices of the peace more safe in the execution of their duty;" and they would be perfectly secure if they had an opportunity of justifying themselves. [Lord Chief Justice *Gibbs*.—"The legislature has imposed on the plaintiff the *onus* of proving want of probable cause; and though he may have difficulty in doing it, he cannot recover without doing so."] In actions for malicious prosecutions, where the bill of indictment had been found by the grand jury, as in the case of *Purcell v. Macnamara*, on which the Chief Baron founded his opinion, there was something, they said, from whence to infer the existence of probable cause, and which the plaintiff, therefore, must do away, before he was entitled to recover. In cases like the present, if any cause existed, the defendant was the only person who was enabled to prove it.

Lord Chief Justice GIBBS.—The principles on which these actions are founded are not disputed. It is admitted that there must be proof of the want of probable cause; but the question is, in respect of what must the absence of probable cause be proved? There is a wide distinction between actions for malicious prosecutions and actions for malicious convictions. In the former, if the plaintiff shew that there was no ground for the accusation, malice is to be inferred from that circumstance, because the prosecutor must have sworn to the truth of the charge. But in actions for malicious convictions, the question of probable cause does not depend on the actual guilt or innocence of the plaintiff, but on the evidence which is given before the magistrate. The plaintiff contends that it was incumbent on the defendant to produce that evidence, and that he, the plaintiff, had no means of getting at it. Depositions are given *vis à vis*, and the plaintiff

might either have called somebody who was present, or else he should have given the magistrate notice to produce the depositions. But certainly as the plaintiff could not make out his case, without proving want of probable cause, and as that depended on what passed before the magistrate, the plaintiff, having given no evidence of this, is not entitled to recover.

Mr. Justice HEATH.—I entirely concur with his lordship's opinion. It does not follow that, because the plaintiff has been improperly convicted, the conviction was malicious on the part of the defendant.

Mr. Justice CHAMBER was of the same opinion.

Mr. Justice DALLAS.—Why did not the plaintiff call the witness who was examined before the magistrate, and on whose testimony he was convicted? Instead of that, he called every one else but him.

Rule discharged.

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BURLLEY  
v.  
BLACKBURN.

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BLACKBURN v. KYMER and others.

Friday, May 20.

THIS was an action on the money counts, to recover the sum of £1812, under the following circumstances. Mr. *Morton*, a planter in the island of *Nevis*, had consigned a quantity of sugar to Messrs. *Williams* and *Wilson* of *Liverpool*, who were the owners of the vessels in which the sugars were brought, with directions to pay over the net proceeds to the plaintiff. *Williams* and *Wilson* applied to the defendants, as brokers, to dispose of the sugars, and received large advances from them on the credit of them. The present action was brought by *Blackburn*, as the ultimate consignee, to recover the proceeds of

*A.* consigns goods to *B.*, with directions to pay over the net proceeds to *C.*—*B.* employs *D.* to dispose of them.—In an action by *C.* to recover the proceeds from *D.*, *D.* is entitled to make the same deductions for freight, &c. as *B.*, who was the owner of the ship in which the goods were brought, might have made.

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these sugars. At the trial of the cause at the sittings after last *Michaelmas* term, at *Guildhall*, before Lord Chief Justice *Mansfield*, the defendants contended that they had a lien on the proceeds for the advances made by them on the sugars; but his lordship held that the plaintiff, as consignee, could not be affected by any claim which the defendants might have upon *Williams* and *Wilson*. The defendants then objected that, at all events, they were entitled to deduct the freight and other charges, consisting of premiums of insurance, commission on the sale of the sugars, and interest on the money which the defendants had advanced on them from the gross proceeds. The learned judge, however, directed a verdict generally for the whole amount, reserving this question for the consideration of the court. The *Solicitor-General*, accordingly, in *Hilary* term, moved to reduce the verdict from £1812, to £1274. The only ground, he said, on which the plaintiff could support his action was, that the defendants must be considered as standing in the place of *Williams* and *Wilson*; he could not, therefore, demand of the defendants more than he could have recovered against *Williams* and *Wilson*. There had been no specific charge of freight, because the sugars had been brought in ships belonging to *Williams* and *Wilson*; but that he contended did not diminish their right to deduct it, and the defendants, consequently, who stood in their place, were also entitled to deduct it. [Lord Chief Justice *Gibbs*.—In order to entitle the defendants to make this deduction, they must shew, either that they have paid the freight, or that they are clearly and indisputably liable for it, or else that they have discharged the plaintiff by taking the liability on themselves.] The rule *nisi* being granted,

Mr. Serjt. *Lens* now shewed cause against it. The question was, *how far* the plaintiff was entitled to recover

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in this action. As to freight, he admitted that as *Williams* and *Wilson* were owners of the ships in which the sugars were imported, they would have been entitled to it; and if the defendants had had any authority from *Williams* and *Wilson* to that effect, they would perhaps have had a right to deduct it. But so far from that, the plaintiff, he said, had received notice from *Williams* and *Wilson* not to pay the defendants the freight. The defendants, therefore, were attempting to set off against the plaintiff's claim, an account between themselves and *Williams* and *Wilson*, which the latter did not acknowledge. If the freight were to be deducted, the plaintiff would still be liable to be called on to pay it to *Williams* and *Wilson*; unless, therefore, the defendants would indemnify him from this liability, they were not authorised to deduct it.—With regard to the expence of insurance, that, he said, had been incurred by the defendants, without the plaintiff's privity, who, in fact, had insured for himself. As to the commission which they claimed, for selling the sugar, that sale, he contended, was in their own wrong, for they were not the agents of the plaintiff, and the latter might have brought trover against them for the amount. The interest, lastly, might be a subject of consideration between *Williams* and *Wilson* and the defendants, but could in no way affect the plaintiff, who was not concerned in the advances which the defendants had made to *Williams* and *Wilson*. The verdict, therefore, should remain as it was.

The *Solicitor-General*, *contra*, insisted that the plaintiff could recover no more against the defendants than he could have recovered against *Williams* and *Wilson*, who were the consignees of the sugar, though for a special purpose. Being such consignees, the legal property of the sugars vested in them, and they were to dispose of them in the way they thought most advantageous. Here he was stopped by the court.

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Lord Chief Justice GIBBS.—The questions in this case are, for whom did the defendants sell these sugars, and how far they were answerable for the produce of them when sold? They were employed by *Williams* and *Wilson* to dispose of the sugar: Then had *Williams* and *Wilson* a right so to employ them? If they had not, the plaintiff might step in and disavow the transaction. The sugars originally belonged to *Morton*, and he, therefore, had a right to direct in what manner they should be disposed of. He accordingly directs the *net proceeds* to be paid over to the plaintiff; that expression supposes that something is to be deducted from the gross produce; and as the sugars were to be brought to this country, were to be insured, and afterwards sold, the net proceeds must be taken to mean the original price after deducting the freight, the expence of insurance, the commission on the sale, and the interest on the money advanced.

The rest of the court concurring, the rule to reduce the verdict was made

Absolute.

GILES and another v. NATHAN and another.

A. deposits goods with *B.* as a security for money advanced by *B.*, with a promise to deliver the bill of lading, when it should arrive, indorsed to *B.* *C.* is employed as a broker to dispose of the goods for *B.*'s benefit. Before the bill of lading arrives, the goods are attached in the mayor's court in the hands of *C.* by a creditor of *A.*—Held, that the transfer of the property to *B.* was complete, though the bill of lading had never been indorsed, and that, therefore, the foreign attachment was no answer to an action by *B.* against *C.* for the proceeds.

The defendant in *audita querela* cannot move in arrest of judgment, but must either demur at the time of filing the writ of *audita querela*, or, if the verdict be given against him, must bring a writ of error, or move for a new trial.

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 GILES  
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time, *N. and W. Nathan*, the present defendants, were under acceptances for *Levin*, and he was otherwise indebted to them.—In the autumn of the same year, *Josephs* received advice from *Levin*, who then resided at *Koningsberg*, of his having shipped a cargo of wheat for *London*; and finding himself at this time embarrassed to make good his payments for *Levin*, *Josephs* applied to the defendants, *N. and W. Nathan*, for the sum of £1000, which they agreed to advance, provided the wheat, which had arrived in *November*, should be deposited in their hands as a security, and provided the bill of lading, when it arrived, should be delivered to them indorsed. *Josephs* agreed to this condition; but the bill of lading not being yet arrived, the captain refused to deliver up the wheat. *Giles* and *Hemming*, the present plaintiffs, who had been applied to, as brokers, to dispose of the wheat, agreed to give the captain a bond of indemnity, which they accordingly did, and the wheat was thereupon delivered to them and by them sold, and the proceeds, amounting to £2079 : 16s. : 6d., were carried to the account of the present defendants. The bill of lading arrived in *June*, 1811, and was indorsed and delivered by *Josephs* to the *Nathans*, who thereupon recovered the proceeds of the wheat in an action against *Giles* and *Hemming*, at the sittings after *Michaelmas* term, 1812. Before this action was commenced, viz. in *April*, 1811, attachments of this property were lodged in the mayor's court, in the name of *Smith and Co.*, against *Meyer Levin*, but were not then tried, owing to the defendants, *N. and W. Nathan*, filing bills of proof, laying claim to the property attached as belonging to *Meyer Levin*. These bills of proof, however, were never followed up. After the trial at *Guildhall*, by which the *Nathans* recovered the proceeds against *Giles* and *Hemming*, as above stated, the latter moved to set aside this verdict, on the ground that the property had been attached in the mayor's court.

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On that occasion, Lord Chief Justice *Mansfield* observed, that it was an unfortunate case for the defendants in that cause, *Giles* and *Hemming*, who would be obliged to pay the money twice over; but that, even if judgment had been obtained in the mayor's court, before the action then in question had been commenced, his lordship did not see how that judgment could have been given in evidence, or if it could, how the verdict could have been affected by it. The *Nathans* had given a valuable consideration for the wheat, and it was sold for their benefit; the proceeds, therefore, became their property the moment they were received by *Giles* and *Hemming*, subject only to the possibility of *Levin's* dishonestly indorsing the bill of lading to some other person. On a bill of interpleader, *Giles* and *Hemming* might have compelled the *Nathans*, and the persons attaching in the mayor's court, to decide their own dispute between themselves, but there was no ground for disturbing the verdict which had been given in this court in favour of the *Nathans*. The attachments in the mayor's court afterwards came on to be tried, and were also decreed against *Giles* and *Hemming*, who, accordingly, were obliged to pay on the attachments, the same sum, for which a verdict had already been obtained against them. The present action was then commenced at the suit of *Giles* and *Hemming*, by writ of *audita querela*, in which the issues were, *first*, whether, before affirming the plaint against *Levin*, the property had either been disposed of or assigned to the defendants in the *audita querela*; *secondly*, whether it had been sold to them. The *audita querela* came on to be tried at the sittings after last *Trinity* term, at *Guildhall*, before Lord Chief Justice *Mansfield*, when the facts above stated being given in evidence by *Josephs*, who was *Levin's* agent, the jury, being of opinion that the property in the wheat could not pass except by indorsement of the bill of lading, which did

not take place till after the attachment, found a verdict for the plaintiffs in the *audita querela* on both issues.

The *Solicitor-General* and Mr. Serjt. *Best*, in last *Michaelmas* term, moved for a rule to shew cause, either why this verdict should not be set aside, and a new trial granted; or else why the judgment should not be arrested, and the defendant have leave to enter up judgment in the original action. They contended that the transfer of the wheat to the defendants from *Levin* was a complete sale, without the indorsement of the bill of lading, which, they said, was by no means necessary for the purpose of passing the property. Suppose the shipper had destroyed the bill, the transfer would still have been good and perfect. They also contended that the attachment in the mayor's court was no answer to the claim which the *Nathans* had upon the wheat; because an attachment could never be set up as defence to an action in another court, except where the defendant in each action was the same. The present plaintiffs were endeavouring to resist the defendants' claim by saying that they had paid over the proceeds to a third person. The court granted a rule *nisi*.

Mr. Serjt. *Lens*, Mr. Serjt. *Vaughan*, and Mr. Serjt. *Copley* (a), in shewing cause, contended that the jury had done perfectly right in finding that there had been no sale of the property to the *Nathans*, because the bill of sale was an essential document, and the receipt of it was essential to a complete transfer, at least as far as regarded third persons, whatever might have been the effect of the transaction as between *Levin* and the *Nathans*. The present defendants could not say that the attachment was *res inter alios acta*, for they had made themselves parties to the transaction by filing their bills of proof, which they re-

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(a) This part of the argument took place in *Michaelmas* term.

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linquished as soon as they had effected the intended purpose, viz. of postponing the judgment in the mayor's court to that which they obtained in the first action in this court. It would be an anomaly in the law, if the present plaintiffs were to be obliged to pay this money twice over; first to *Levin's* creditors, and then to the present defendants. [Mr. Justice *Heath*.—That is a risk to which all stakeholders are liable.] The *audita querela*, they said, was an action of equitable relief, and was to be considered less strictly than other actions, whereas the case of the present defendants was certainly one *stricti iuris*.

Adjournatur.

The argument was not proceeded in during *Hilary* term. In *Easter* term the learned serjeants on the part of the plaintiffs in the *audita querela*, argued at considerable length against that part of the rule which sought to stay the judgment in the *audita querela*. On a subsequent day in that term, however, Lord Chief Justice *Gibbs* (Sir *James Mansfield* having resigned since the former part of the argument) said, that a difficulty had occurred to the court as to that part of the rule. If, said his lordship, we should be of opinion that the *audita querela* was bad, and should make a rule accordingly, the plaintiffs in that suit must have an opportunity of questioning our decision on a writ of error; and if they could not do so on our rule, that would be a decisive reason with us for not granting it. Besides, we doubt whether a motion in arrest of judgment be a fit motion on an *audita querela*, because in a common case, the plaintiff is precluded by an arrest of judgment, from receiving any benefit from his suit,—he can go no farther; but in the *audita querela*, it would, if granted, give the plaintiff all he wants; for he has a writ of *superseas* already. At all events, I doubt

If it would not be an answer to the defendants in the *audita querela*, that they ought to have brought their writ of error. When the plaintiffs filed their writ of *audita querela*, the defendants should either have demurred, or should have brought a writ of error, which latter remedy they still have in their power. However, they are not precluded from urging their rule for a new trial.

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Mr. Serjt. *Lens*, Mr. Serjt. *Vaughan*, and Mr. Serjt. *Copley*, accordingly, shewed cause against that part of the rule. They contended, as before, that the jury were perfectly warranted on the facts as they appeared before them, in finding the verdict which they had found. They further said that, even supposing the property might have passed without the indorsement of the bill of lading, still it was a question of credit as to the testimony of *Josephs*; and they adverted to several incorrect statements on his part as to the time when the bill of lading arrived. It was a fair inference for the jury to draw, that the indorsement by *Josephs* had been made collusively, in order to disappoint the prior right of the person suing in the mayor's court.

The court took time to consider of this question, and on *Saturday*, the 14th of *May*, the Chief Justice, stopping the *Solicitor-General*, who was to have argued with Mr. Serjt. *Best* in support of the rule, delivered the judgment of the court.

We are of opinion that there ought to be a new trial in this case. The facts are, that *Levin* was carrying on business in this country by the means of *Josephs*, who, wanting assistance to enable him to make good *Levin's* payments, applied to the *Nathans* to furnish him with £1000. They, however, refused to make this advance, without receiving sufficient security for it. A cargo of wheat had arrived belonging to *Levin*, but without the bill of lading; and *Josephs* offered to deposit this in

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Nathans' hands, and to deliver to them the bill of lading indorsed, whenever it should arrive, in order to cover the advance. The captain of the vessel, however, refused to deliver up the wheat, unless, for his security, the bill of lading were produced duly indorsed; and it was only for his own security that he had a right to refuse, for in other respects the delivery was already complete between *Josephs* and the *Nathans*; and when the bill of lading was delivered to the *Nathans*, the delivery was complete in every respect. The captain, for the accommodation of all parties, agreed to accept an indemnity, which *Giles* and *Hemming*, who had been applied to to dispose of the wheat, were to give him, as against those to whom the bill of lading might by possibility be indorsed before its arrival in this country. Having that security, he delivered the wheat to *Giles* and *Hemming* for sale; they again were to take care to secure themselves against the claims of any persons to whom the bill of lading might be indorsed, other than the *Nathans*; they therefore undertook to pay over the proceeds to *Nathan*, upon condition of his producing the bill of lading indorsed, because, till then, it was possible they might be called upon from a different quarter. At last the bill of lading is produced, indorsed to the *Nathans*; but in the mean time, a creditor of *Levin* had attached the produce of the wheat in the hands of *Giles* and *Hemming*, as for a debt due to him from *Levin*. In no way can that attachment be supported. You can always try an attachment by asking this question; could the defendant in the mayor's court have brought an action himself against the persons standing as garnishees, for that which is the subject of the attachment? If not, it could not be attached as for a debt due to himself. Now *Levin* would have been precluded from bringing an action against *Giles* and *Hemming* for the produce of this wheat, both by what had been said,

and by what had been done. It had been agreed by *Josephs*, who had the power to do so, that the *Nathans* should have the wheat as a security before the bill of lading arrived, and that the bill of lading should be indorsed to them when it did arrive; and *Josephs*, under that agreement, procured the delivery of the wheat to *Giles* and *Hemming*, to be sold on behalf of the *Nathans*. That transaction gave them a complete title before the bill of lading arrived, against any one who should attach the property. The lien which the *Nathans* had on the wheat, continued on the price of that wheat, and goods can never be attached in a person's hands without first satisfying that person's lien, and these goods were only in the hands of *Giles* and *Hemming*, as holding the possession of them for *Nathan*. Blame has been thrown on the *Nathans* for not pursuing their bill of proof; but that was not requisite, for it would be impossible to support an attachment of goods as the property of *A.* in *B.*'s possession, on which *B.* has a lien. The question in this case is, whether the jury acted under the impression, that before the bill of lading was indorsed the goods could not be assigned. It is quite clear they did act under that impression, because the late Lord Chief Justice concludes his report by saying so. However, we are not of that opinion, and from my note of the Chief Justice's report in *Nathan* and *Giles*, it appears, that he was of opinion that the property might be transferred previously to the indorsement of the bill of lading, subject certainly to *Levin's* afterwards dishonestly indorsing it.

Rule absolute for a new trial.

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Saturday,
May 21.

COOK V. GREEN.

The defendant in replevin avows for rent in arrear, and that the goods had been clandestinely removed. The plaintiff pleads 1, *non tenure*; 2, no rent in arrear; and 3, that the goods were not clandestinely removed. The last issue only was found for the plaintiff:—Held that the defendant was entitled to deduct from the plaintiff's costs, the costs of the two first issues which were found for the defendant.

THIS was an action of replevin, to which the defendant avowed that the plaintiff held certain messuages, as tenant to the defendant, at the yearly rent of £18: 18s.; and because the sum of £20: 10s. of the said rent was due and in arrear from the plaintiff to the defendant, and because the goods and chattels in the declaration mentioned were fraudulently and clandestinely removed from the premises; therefore the defendant well avowed, &c. The plaintiff pleaded in bar, *first*, that he did not hold as tenant to the defendant; *secondly*, that no rent was in arrear; and *thirdly*, that the goods were not fraudulently and clandestinely removed. Upon which pleas issue was joined. The cause was appointed to be tried at *Westminster*, at the sittings after last *Trinity* term, but was referred to arbitration; the costs to abide the event. The arbitrator found the two first issues for the defendant, and the third for the plaintiff.—The prothonotary, in taxing the costs, taxed only those of the third issue, disregarding the costs of the first and second, which had been found for the defendant.


Mr. Serjt. *Copley* now moved that the prothonotary might review his taxation, and deduct from the costs which he had awarded to the plaintiff, those of the two first issues. He cited the case of *Brooke v. Willett* (a), in this court, and that of *Dodd v. Joddrel* (b), in the court of *King's Bench*, as establishing the principle that where one or more of several issues in replevin are found for

(a) 2 H. B. 435.—(b) 2 T. R. 235.

the plaintiff, by which he is entitled to judgment, and the rest for the defendant, the latter is entitled to the costs of the issues which are found for him, unless the judge certify that the plaintiff had sufficient cause for pleading the matters on which these issues were founded. That such was the practice of this court was decided, he said, by the case of *Vollum v. Simpson* (a). The arbitrator, he contended, had no power to certify as a judge, under the statute 4 *Ann. c. 16. s. 5.*, any more than under stat. 22 and 23 *Car. 2. c. 9 (b)*.

Lord Chief Justice *Gibbs*.—The plaintiff complains that his goods have been distrained; the defendant justifies the distress, by saying that rent was due to him from the plaintiff, and that the goods in question had been fraudulently removed from the premises. The plaintiff then denies three facts, two of which were unnecessary; the defendant, therefore, has been thereby put to unnecessary expence, and justice requires that he should be reimbursed. I cannot distinguish between the present case, and those which have been cited. However, I only throw this out for my brother *Best's* consideration.

Mr. Serjt. *Best* shewed cause in the first instance, and cited *Postan v. Stanway* (c), where, in an action of *assumpsit*, the defendant pleaded the general issue and the statute of limitations to the whole sum demanded; and as to part, that the promises were made by the defendant jointly with one *A. B.* The two first issues were found for the plaintiff, the last for the defendant. The court of *King's Bench* held that the defendant was not entitled to deduct the costs of the last issue from the costs of the trial, which the plaintiff was entitled to. In that case, as in

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(a) 2 *B. and P.* 368.—(b) *Swinglehurst v. Altham*, 3 *T. R.* 139. *Ward v. Mallinder*, 5 *East* 489.—(c) 5 *East* 261.

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the present, there must have been a rule to plead several matters under the statute; and this was an authority, he said, by which that of the cases cited on the other side was considerably shaken. He contended that the issues which the plaintiff had taken, were all of them such as common prudence required him to take.

Mr. Serjt. *Copley*, in reply, was stopped by the court.

Lord Chief Justice GIBBS.—The case which has been cited by my brother *Best* is distinguishable from the present, because Lord *Ellenborough* said that the question, in that case, must be considered as if there had been no double plea. Besides, the mode of taxation in replevin, where both parties are actors, is different from that in other actions. But it is sufficient for me to observe that this point has been decided in *Broke v. Willett* and *Vollum v. Simpson*, in the latter of which cases my brother *Heath* said, that the costs intended to be given by the statute of *Ann.* appeared to him to be all the costs which followed the unnecessary plea; so that the attention of the court was particularly called to that question. I cannot agree with my brother *Best's* opinion, that these were all necessary issues for the plaintiff to take, and such as a cautious and prudent man would have taken; for the defendant could not have supported his avowry, without proving all the three facts.

Per Curiam,

Rule absolute.

SIMON V. GURNEY.

Saturday,
May 31.

Mr. Serjt. *Best* having, on a former day in this term, obtained a rule *nisi*, to set aside the execution which had been issued and levied in this cause for irregularity, on the ground that the writ of *fi. facias* directed the money to be returned "before us," instead of "before the king's justices at Westminster,"

Where a writ of *fi. fa.* directed the money to be returned "before us," instead of "before the king's justices at Westminster," but was tested by the Chief Justice of C. P., the court permitted the plaintiff to amend on payment of costs.

Mr. Serjt. *Marshall*, on the part of the plaintiff, now shewed cause, contending that as the writ was tested by Sir *Vice Gibbs*, as Lord Chief Justice of the court of *Common Pleas*, it was evidently sued out of this court; and as there was, therefore, something on the face of the writ to amend by, it might be amended under the statute of *refails*.

The court, accordingly, on the authority of *Atkinson v. Newton* (a), where this court permitted a writ of *fi. facias*, which had been made returnable on a *King's Bench*, instead of a *Common Pleas* return day, to be amended by the award of execution on the roll,

Discharged the rule, on the plaintiff moving to amend the writ, and on his paying the costs of the present application.

(a) 2 B. and P. 336.

Saturday,
May 21.

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A. covenants with *B.* to serve him for certain wages for 3 years, at the end of which time a balance remains due to him from *B.* *A.* then enters into a fresh contract, not under seal, to serve *B.* at increased wages; and at the end of three years more, it appears that he has received, at different times, sums more than sufficient to cover the balance due on the former contract:—Held, that the last mentioned sums having been paid generally, without specifying on what account, *A.* had a right to apply them to the satisfaction of the simple contract debt.—Where a cause has been referred to arbitration, the court cannot interfere to enter a nonsuit against the arbitrator's direction; but the party objecting to the award must move to set it aside.

By indenture, dated the 27th of *August* 1805, between the defendant, proprietor of *Bance* island, of the one part, and the plaintiff, a surgeon, of the other part, the plaintiff covenanted to serve the defendant in the said island, in the quality of surgeon, for three years; and the defendant, in consideration thereof, covenanted with the plaintiff, amongst other things, to pay him at the rate of £6: 6*s.* per month. Under this agreement, the plaintiff went out to *Bance* island, where he arrived on the 20th of *November* 1805, and remained in the defendant's employment till the year 1812, when he returned to *England* and commenced two actions against the defendant; one, on the covenant, for his services for the first three years; the other, in assumpsit, for the remaining period. Both causes and all matters in difference were referred to the arbitration of a gentleman at the bar, who found by his award, among other things, that there was due from the defendant to the plaintiff, as his wages as surgeon, under the indenture declared upon in the action of covenant, the sum of £129: 9*s.* 2*d.*, and in the action of assumpsit, the further sum of £421: 7*s.* 8*d.* But as it had been contended on the part of the defendant, that the plaintiff was not entitled to recover any thing on the action of covenant, the arbitrator proceeded to state the following facts for the consideration of the court.—“The plaintiff served the defendant under the indenture “for three years ending the 23d of *Nov.* 1808, whereby “he became entitled to the sum of £226: 12*s.*; but having “at different times received the sum of £97: 2*s.* 10*d.*, there

"remained a balance of £129: 9s: 2d, which was the sum
 "awarded in the first action. At the end of the three years,
 "the plaintiff entered into a new contract, not under seal,
 "to serve the defendant, at the increased wages of £175 a
 "year; under which contract, he served the defendant for
 "three years and a quarter, whereby he became entitled,
 "after deducting the sum of £147: 7s: 4d., which he had
 "received during the latter period, to the sum of £421:
 "7s: 8d., the sum awarded in the action of assumpsit.
 "If, however, by any rule of law, the last mentioned sum
 "ought to be applied, in the first instance, in discharge
 "of the specialty debt, the plaintiff would not be entitled
 "to recover in the action of covenant, but there would
 "be due to him in the action of assumpsit, the sum of
 "£550: 16s: 10d., being the amount of both the sums
 "awarded. It appeared that the different sums which
 "the defendant claimed a right to set off against the
 "plaintiff's demand, had been paid on account generally,
 "and had not been applied by the defendant in discharge
 "of the first debt alone, nor was any balance struck
 "between the parties on the 23d of November 1808, when
 "the three years under the covenant expired."

Mr. Serjt. *Copley*, on a former day in this term, moved
 that the defendant might be at liberty to enter a nonsuit
 in the action of covenant; and that the plaintiff should
 enter up his judgment in the other action for the amount
 of both the sums awarded. He contended that the
 plaintiff was not entitled to recover in the first action,
 because though, in a common case, the party receiving
 money might place it to what account he chose, yet as
 in the present case, it was paid on a running account,
 and no distinction had been made as to the first contract
 being under seal, and the second otherwise, it must be
 taken to liquidate the debt which had first become due.

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He cited *Dawe v. Holdsworth* (a), where Lord Kenyon said that, as no particular directions had been given about the application of money paid on account, it must be placed to pay off the old debt first. He also cited *Goddard v. Cox* (b), *Meggot v. Mills* (c), where Lord Holt said, that if A., a trader, owe B. £100, and then quit his trade, and afterwards become indebted to B. £100 more; on payment by A. of £100, without specifying on what account, it would be too rigorous to admit B. to sue out a commission of bankrupt against A. on the old debt of £100;—*Hammersley v. Knowlys* (d), and *Newmarch v. Clay* (e), in which latter case the authorities on this subject are diligently collected. The equity of the case, he said, was, at all events, in favour of the present application. [Lord Chief Justice Gibbs.—It may be of great importance to a creditor to retain his remedy on a deed, and get his simple contract debts as he can. I think, therefore, we cannot grant your motion in its present form. Besides, how can we direct a nonsuit to be entered on the first action? What can we do, except set aside the award? Unless the arbitrator had ordered a nonsuit, we have no authority to do so. Your proper motion would be to set aside the award.] Accordingly, on Mr. Serjt. Copley's motion, a rule nisi was granted to set aside the award.

On this day, Mr. Serjt. Best and Mr. Serjt. Vaughan shewed cause against the rule. They admitted that the defendant would have had a right to say to which debt the particular payments should have been applied; but where the money was paid generally on account, which, according to the arbitrator's statement, was the case in the

(a) *Peake's N. P. cases*, 64.—(b) 2 *Str.* 1194.—(c) 1 *Lord Raymond*, 286.—(d) 2 *Esp. N. P. cases*, 666.—(e) 14 *East*, 239.

present instance, the receiver might apply it to whichever of the two debts he chose; and the plaintiff of course preferred to place it to the account of the simple contract; because by that means he retained a better security for the remainder of his debt: In *Meggot v. Mills*, above cited, the court were inclined to apply the payment to the first debt, in order to take the debtor out of the bankrupt laws; and even on this point Lord *Holt* declined giving an absolute opinion. The case of *Dawe v. Holdsworth*, they said, was decided on the same ground. These cases, therefore, were exceptions to the general rule; and unless there had been any such circumstances in the present case, or an express appropriation by the party paying the money, the present motion could not be supported.

Mr. Serjt. *Copley contra*, did not dispute the general rule, that where there are two distinct accounts, and money is paid generally, the person receiving it may apply it to either of the accounts at his option. But he contended that, in this case, there was but one continued account; and when that was so, the party receiving it was bound to apply it to the earliest part of the account, whatever might be the number of contracts between the parties. It never could be contended that, where there were a number of debts, forming but one account, though consisting of different *items*, payment of a sum of money could be appropriated to part payment of all the *items*, leaving still a debt on each *item*. Here, however, the parties had treated it as one account; for since the commencement of the second contract, the wages had been paid in a gross sum on both accounts. The case of *Dawe v. Holdsworth* was exactly in point; for there, the debt was partly on bond, and partly on simple contract; and Lord *Kenyon* did not rest his decision on its being a case of bankruptcy: On the contrary, he said, *that* part

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of the question was decided by inference from that which he was now citing. The principle, however, was the same, whether one debt were on bond, and the other on simple contract; or whether they were both on simple contract; and the general rule applied with equal strictness to both cases.

Lord Chief Justice GIBBS.—I think the arbitrator has taken a correct view of the law of this case; and that the payee was at liberty to apply the sums which he received to the payment of the simple contract debts, for which he had not so good a security as for his other debts, leaving open his claim for what he had due on the former account. The general rule is not disputed, that a person who owes money on two accounts may pay it to which of them he pleases; but if he do not ascribe it to one account in particular, and there be several accounts open, the payee may apply it to which of them he pleases. But it is contended by the defendant, that there are not different accounts in this case;—that they are not different debts, such as the rule applies to;—he insists that there was but one running account, and of one particular kind, viz. for wages; and therefore that this case is, in principle, the same as those of *Meggot v. Mills*, and *Dawe v. Holdsworth*. But I conceive that those cases must have proceeded on the desire which the court had to take the debtors out of the bankrupt laws; conceiving it hard that when a man had made a payment, he should not have the full benefit of such payment. There was, therefore, some foundation for those decisions; but they are both exceptions, and by no means contravene the general rule. If the defendant could establish the position that there was only one debt in this case, I allow that he might succeed in his present application; but he would find that a very difficult proposition to maintain. There was first a covenant to pay wages for three years:

At the end of that time, a parol contract is entered into, for the same species of service and payment it is true, but still they formed two distinct debts, different likewise in their consequences; and I cannot say that, because the obligation into which the defendant entered on both contracts was the same, viz. to pay wages, the debts must have been the same also. Suppose a bond were to be given for money lent, and at a subsequent time, a promissory note for other money lent; it would be impossible to say that these were not distinct debts: So in the present case, the accounts are just as distinct; the general rule, therefore, that the money may be applied to either account, is applicable; and the arbitrator was right in awarding the payments to be applied *ad modum recipientis*.

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The rest of the court concurring,

Rule discharged.

ADAMS v. ARENELL.

Monday,
May 23.

Mr. Serjt. *Best* having, on a former day, obtained a rule *nisi* to change the venue in this cause from *London* to *Hampshire*,
 Mr. Serjt. *Lens* now shewed cause against it, on the ground that the affidavit on which the rule had been obtained stated, "that the cause of action, if any, arose in the county of *Hants*, and not in the county of *Middlesex*, or elsewhere, out of the said county of *Hants*," whereas it should have been "and not in the city of *London*."

On motion to change the venue, the affidavit must state explicitly that the cause of action did not arise in the county from which the venue is sought to be changed.

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Mr. Serjt. *Best* contended that *the county of Middlesex* might be rejected as surplusage, and then the affidavit would stand thus; "and not elsewhere out of the said "county of *Hants.*" But,

Per Curiam, that would not be sufficient. The affidavit must state that the cause of action did not arise in the county from which the motion is made to change the venue.

Rule discharged (a).

(a) See *Tidd's Practice*, 610, 5th edition.

END OF EASTER TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

IN

TRINITY TERM,

IN THE

FIFTY-FOURTH YEAR OF THE REIGN OF GEORGE III.

Regula Generalis.

IT is ordered that, from and after the last day of this present *Trinity* term, the seal office shall be open from eleven in the morning till two in the afternoon; and from five to seven in the evening, during term; and for ten days after every issuable term, and one week after every other term; and from eleven in the morning till three in the afternoon at all other times.

Monday,
June 13.

DUBOIS and others, assignees of SCHRODER, v. LUDERT.

A defendant may plead a secret partnership in abatement, though the plaintiff had no means of knowing of the partnership, and could not have proved it, had he joined the secret partner in the action.

THE plaintiffs declared, as assignees of *J. F. Schroder*, a bankrupt, that in consideration that the bankrupt would deliver to the defendant divers goods, to be disposed of by the defendant for a certain reward and commission, the defendant undertook to render a reasonable account of the said goods, and to pay him the net proceeds;—that the defendant, afterwards and before the bankruptcy, sold and disposed of the said goods at *Altona* for £2000;—but that he never rendered to the bankrupt, before his bankruptcy, or to the plaintiffs as assignees since the bankruptcy, any account of the said goods, or paid over the net proceeds thereof. The defendant pleaded in abatement, that the promises in the declaration mentioned were made by him and one *R. Groning* jointly, (they being partners) and not by the defendant alone; which said *R. Groning* was still alive. On this plea issue was joined. At the trial of the cause at the sittings after last term at *Guildhall*, before Lord Chief Justice *Gibbs*, it appeared that the defendant and *Groning* were partners in all their transactions both in this country and on the continent, the business being carried on here under the name of *Groning*, and in *Heligoland* under the name of the defendant; but that the partnership was not known to the bankrupt at the time of the agreement between himself and the defendant: That *Groning* had a demand on the bankrupt to a larger amount than that of the bankrupt or his assignees on the defendant; so that by obliging the plaintiff to join both the partners, the defendant would be able to set off their claim against the present action. The Chief Justice was of opinion, that

a secret partnership might be pleaded in abatement, provided the defendant got no unfair advantage by it, and his lordship considered that there could be nothing unfair in setting off the one account against the other. He therefore directed a verdict for the defendant, with liberty to move to set it aside, and enter a verdict for the plaintiff.

Mr. Serjt. *Lens*, accordingly, now moved for a rule *nisi*, and contended that this was a transaction unconnected with the partnership; that it was a special employment of the defendant alone, who must not be at liberty to consider it a sole or a joint transaction, according as it might suit his convenience. If the bankrupt had had any means of knowing of the partnership, there might have been some colour for this defence; but it had been proved that there was no understanding between the bankrupt and the defendant of that circumstance, and therefore, if the plaintiffs had brought their action against both, they must have been nonsuited for want of proof. [Lord Chief Justice *Gibbs*.—That is the case in all secret partnerships; but the difficulty of proof can make no difference on either side; the facts must be taken as they appear in evidence.] Mr. Serjt. *Lens* then contended that, on principles of law, no secret partnership could be pleaded for the purpose of giving a party the liberty of saying a particular transaction was joint or several at his pleasure. If it had been for the advantage of *Groning* not to have been joined, he would have kept the partnership secret. [Mr. Justice *Heath*.—Is it not a common thing for a carrier, in an action against him for not conveying goods, to plead a secret partnership?]

Lord Chief Justice *GIBBS*.—My brother *Lens* has now put the question on its true ground, and it is this; whether, if a man enter into a contract with *A* not knowing that *A*. has a partner, and afterwards bring an

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action against him, *A.* can set up as a defence, that he had a partner, who was concerned in the profit and loss of the adventure, though that circumstance were unknown to the plaintiff?—I am of opinion that, unless the interest of the parties be materially altered by it, such a defence may be made. We all recollect that such pleas have been pleaded, and the principle is, that where the defendant subjects the plaintiff to no other inconvenience, but that of joining another person, he is entitled to do so. It is no injustice that, in obliging the plaintiff to sue both partners, we let in the defendants to set off a partnership transaction, against the demand which the plaintiffs have upon them: And the assignees stand exactly in the same situation in this respect, as the bankrupt would have done.

Per Curiam,

Rule refused.

Tuesday,
 June 14.

PINDER v. WILKS and others.

Three partners, *A. B.* and *C.* order goods from abroad, and then dissolve partnership, and make over their property to trustees for their creditors, leaving *A.* and *B.* as agents, to settle the affairs of the firm. The goods arrive, and are delivered to *A.* and *B.* In an action against *A. B.* and *C.* for the freight; held that *C.* was not liable.

THIS action was brought by the master of the ship *Mary*, against *I. B. Wilks*, *R. Bush*, and *R. Wilks*, to recover the sum of £1908, being the amount of freight and primage on a cargo of linseed, under the following circumstances. The three defendants, in April 1813, were carrying on business in partnership, as merchants in London, and being in want of a quantity of linseed, but being desirous that it should not be known that they were engaged in the transaction, they applied to a Mr. *Parsons*, to transact the affair for them. The bill of lading was accordingly made out in the name of Mr.

Parsons. On the 3d of *July* following, the three defendants dissolved partnership, constituting, however, *I. B. Wilks*, and *R. Wilks*, agents to settle the outstanding concerns of the firm: By deed of the same date, the three defendants assigned all their effects to *Mathias Wilks* and others, as trustees for their creditors, and the present transaction was included in the schedule of the deed; *M. Wilks* covenanting to pay so much of their debts, as the property of the firm should be insufficient to cover. The linseed arrived in *Nov.* 1813, upon which *Parsons* handed over the bill of lading to the two *Wilkses*, who were acting as agents as above stated, and who accordingly received the cargo. At the trial of the cause at the sittings after last term, the Chief Justice was of opinion that the undertaking to pay the freight could only be founded on the supposition that the receiving the goods raised an implied contract to pay it; and that, as the delivery in this case had been to two only of the partners, the action could not be supported against *Bush*. His lordship therefore directed a nonsuit.

The *Solicitor-General* now moved that this nonsuit should be set aside, and a new trial granted. He contended that, as the proceeds of the cargo, when it arrived, were to be applied for the benefit of *Bush's* estate, as well as that of his two partners, he was equally liable with them. It was perfectly clear, he said, that if the deed had not been made, *Bush* would have been liable, because he was a partner in the original transaction, and as much interested in the arrival of the cargo as the two *Wilkses*, though that partnership was afterwards dissolved. The question then was, whether the deed operated as a release. By that deed, *Mathias Wilks* was to receive the property in trust for the creditors of the three defendants; and it might therefore be said that *I. B.* and *R. Wilks* were receiving this cargo as agents for *M. Wilks*; but still, as

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the proceeds were to be applied ultimately for the benefit of the joint estate, there was nothing, he contended, in the deed which destroyed that liability.

Lord Chief Justice GIBBS.—The ground of my opinion was, not that any thing which had passed had relieved *Burb* from his original liability; but that, having left his two partners, they could not, by entering into this implied contract, bring any fresh responsibility upon him. I have thought a great deal upon this subject since the trial. It is quite a new doctrine, that the person who receives goods shall be liable for the freight (*a*); but this does not trench on any of the cases by which that point has been decided; for I do not think that this is a case to which that doctrine applies.

The rest of the court concurred.

Rule refused.

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(a) See *Cock v. Taylor*. 13 *East*, 399.

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Wednesday,  
 June 15.

BRICKWOOD v. ANNIS.

It is no ground for setting aside execution which has been signed against bail, that the plaintiff has accepted a composition from the defendant, and suspended the execution of a *ca. sa.* which had been issued against him; though it were without the knowledge or consent of the bail.

MR. Serjt. *Best*, in the last term, obtained a rule calling on the plaintiff to shew cause why the judgment, which had been signed against the defendant's bail in this cause, should not be set aside, as against *John Annis*, one of the said bail, and nephew to the defendant. He moved on affidavits which stated that judgment was affirmed in this action in *Trinity* term 1813, in consequence of which a writ of *capias ad satisfaciendum* issued against the defendant; that in *July* 1813, the plaintiff, without the knowledge or consent of the bail, agreed to take a composition of 10*s.* in the pound, in consequence of which, and to give the defendant time to bring his

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other creditors to consent to the same arrangement, the execution of the said writ was suspended for the space of three weeks; that the said *John Annis* never heard of any arrangement having taken place till the *October* or *November* following, when he was informed of it by the defendant, in consequence of which he was induced to believe that the action was at an end, and that it was unnecessary that the defendant should be surrendered in discharge of his bail; and he therefore took no further notice of the action till he was informed, in *February* last, that he was fixed as one of the bail.

On this day the *Solicitor-General* was to have shewn cause against the rule, but was stopped by the Chief Justice, who observed that there was no obligation on the plaintiff to be constantly pursuing his debtor. He had only intermitted his vigilance, but had done nothing to prevent the bail from surrendering their principal. The reason why bail were discharged from their responsibility, when time had been given to the defendant, was, he said, that they were thereby prevented from surrendering him.

Mr. Serjt. *Best*, in support of his rule, said that the writ having been sued out, the bail would, as a matter of course, have surrendered the defendant, if they had not been prevented by the arrangement. The plaintiff had been conniving with the defendant to put the bail in a different situation, and was, by fixing the bail, taking advantage of his own delay.

Lord Chief Justice GIBBS.—If the defendant stated the truth to his bail, there was nothing to prevent the latter from surrendering him; and if he did not, the bail, who now seeks to be relieved, must take the consequence of his having believed his uncle's statement.

Mr. Justice HEATH.—The bail were not prevented, by any act of the plaintiff, from surrendering their principal; it would be very mischievous to grant this application.

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Mr. Justice CHAMBRE.—Every thing that was done was as much for the benefit of the bail as for that of the defendant. It would be carrying the practice very far indeed to relieve the bail in this case.

Mr. Justice DALLAS concurred.

Rule discharged.

Thursday,  
 June 16.

SHEPLEY v. DAVIS and another.

*A.* having a quantity of hemp in the hands of *B.*, sells part of it to *C.* at a certain price, payable by *C.*'s acceptance at a stated time, 14 days allowed for delivery; and gives to *C.* an order upon *B.* to weigh and deliver the hemp so sold to *C.* or bearer. Before the 14 days had expired, *A.* gives *B.* notice not to deliver the hemp to *C.* The hemp not having been weighed off, and no bill of exchange having been given in payment for it,—held that the sale of it to *C.* was incomplete; and that *B.* was liable for it in an action of trover by *A.*

THE plaintiff declared in trover for ten tons of hemp, and the defendants pleaded the general issue. The cause came on for trial before Lord Chief Justice *Mansfield*, at *Guildhall*, at the sittings after *Trinity* term, 1813, when a verdict was found for the plaintiff for £1110 damages, with 40*s.* costs; subject to the opinion of the court on the following case:

The defendants are wharfingers at *Davis's* wharf, *Southwark*, and on the 10th of *October* 1812, had in their possession 30 tons of *Riga* hemp, piled up together, the property of the plaintiff, and booked in his name; which hemp had been received into the possession of the defendants, as wharfingers, from on board the ship *Clara Magdalena*, in the names of *Mullett* and *Evans*, on the 18th of *September*, 1812; and was transferred, in the defendants' books, into the name of the plaintiff, on the 3d of *October* following.

The following contract was made for the purchase and sale of ten tons, part of the before-mentioned hemp, by Mr. *Grant*, a broker, with the consent of the plaintiff, and Mr. *David Bromer* therein named, who shortly afterwards became bankrupt and died.

Sold for *Michael Shepley*, Esq. to *David Bromer*, Esq. 15 tons of *St. Petersburg* clean hemp, *ex John*, at the *London* docks, and 10 tons of *Riga* hemp, *ex Clara Magdalena*, at *Davis's* wharf, at £110 per ton, payable by the acceptance of the buyer, one half at 3 months, and one half at 4 months, allowing the usual discount, and 14 days for delivery.

*Charles Grant*, sworn broker.

*London*, 10th *October*, 1812.

The plaintiff, on the same day, signed the following order.

To the proprietors of *Davis's* wharf: Please to weigh and deliver to Mr. *David Bromer*, or bearer, 10 tons of hemp, *ex Clara Magdalena*.

*Michael Shepley*.

*London*, 10th *October*, 1812.

The said quantity of 10 tons was never weighed off by the defendants, or separated from the rest of the 30 tons, so in their possession; nor were the defendants ever required by *Bromer*, or by his assignees, since his bankruptcy, to weigh off or separate the same; but the plaintiff's order was delivered to the defendants, and entered in their books on the 11th *October*, 1812, and the 10 tons, as part of the 30 tons of the said hemp, stood in the defendants' books as the property of the said *David Bromer* from that day. On the 17th of *October*, 1812, *Bromer* stopped payment, and on the 2d of *November* following a commission of bankrupt issued against him; and his assignees (having indemnified Messrs. *Davis*) were the real defendants in this action. On *Bromer* having stopped payment, viz. on the said 17th day of *October*, the plaintiff gave notice thereof to the defendants, and required them not to weigh or deliver the hemp under

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the aforesaid order. No bill of exchange for the price was accepted by *Bromer*, or drawn upon him by the plaintiff. Prior to the commencement of this action, a notice in writing was given to the defendants, demanding the delivery from them of the 10 tons of hemp in dispute, to the plaintiff, who offered to pay the defendants' demand for warehousing the same, and their charges in respect thereof; but the defendants refused to deliver such hemp. It is usual in the trade, for the holder of such order as that of the 10th of *October*, 1812, on selling his interest to a new purchaser, to indorse such order, and for the same to be again indorsed to further purchasers, without any actual weighing-off intervening, until the article is at last taken away. The question for the opinion of the court was, whether there had been a delivery of the hemp to the bankrupt. The case came on for argument in *Easter* term last.

Mr. Serjt. *Best*, for the plaintiff, premised that this was not a sale of 10 tons of hemp standing distinct by itself, so that the purchaser could go and lay his hand upon it, and carry it away at his pleasure. He must know exactly what is his property, and he could not know that, without a previous separation. He admitted that it was the custom in these cases to indorse away the delivery note, without weighing off the goods sold; but he contended that that was merely a transfer of the equitable right. The most material circumstance, however, was, that by the contract, a bill of exchange was to be accepted by the purchaser in payment; but no such bill had been accepted. This was merely an executory contract, and the bankrupt's right was not completed till the conditions had been complied with. He cited the case of *Hanson v. Meyer* (a), which was a case similar to the

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(a) 6 *East*. 614.

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present, except that there, the weighing of the goods was necessary for the purpose of ascertaining the price. The principles, however, of the two cases, he said, were alike, and in the case cited, the court held that, notwithstanding the order for delivery, the property did not pass to the vendee, until the weighing had taken place. He distinguished the present case from that of *Whitehouse v. Frost* (a), because in the latter, the vendee had given his acceptance in payment; and that was the material ingredient in forming a complete delivery. He concluded by insisting that, till the expiration of the 14 days, which were stipulated for the delivery of the goods, the order for delivery was always revocable.

Mr. Serjt. *Lens*, *contra*, said that the case of *Hanson v. Meyer* was in no way applicable to the present, because, in the former, it did not appear what the price would be, till the goods were weighed off. Here, on the contrary, the price was ascertained by the original agreement, and there was no difficulty about the transfer of the property. As to the 14 days not having elapsed, he contended that the true effect of the words as they occurred in the sale note was, not that the contract should be incomplete till the 14 days had passed, and that, till then, either party might put an end to it; but that so much time should be allowed for the actual delivery of the goods; the sale being complete and perfect at the time of the order for delivery. He admitted that, if any thing had remained to be done as between the buyer and seller, the transfer had been imperfect; the moment, however, that the bankrupt received the order from the plaintiff upon the wharfinger, there was nothing left undone between the plaintiff and the bankrupt. The latter became immediately either tenant in common of the

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(a) 12 East. 614.

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whole, in which case trover could not be supported against him by his co-tenant; or he became the absolute owner of one third of the goods, in which case the assignees could not be liable to trover for that third. He contended that the case of *Whitehouse v. Frost* was exactly in point; or if there were any difference, it was in favour of the defendant, because there was a greater divisibility in the case of hemp, than in the case of oil. [Lord Chief Justice Gibbs.—I think if the hemp were to be unpacked again, it would no more alter your right, than the stirring up of the oil in the case cited.]

Mr. Serjt. *Best*, in reply, said that whatever application might be made of *Whitehouse v. Frost* to the present case, the authority of it was overruled by the case of *White v. Wilks (a)*, which had not occurred to him on his first argument, and in which the purchaser of some oil had even agreed to pay rent to the vendor for warehouse-room; but this court held that, as the oil had not been measured off from the vendor's stock, the delivery was not complete. The bankrupt could not be considered as a tenant in common; a sale could never constitute a tenancy in common; but the property must be in one or other of the parties. He cited *Jackson v. Anderson (b)*, where this court held that the different consignees of a quantity of dollars, which had not been separated into their respective shares, were not joint tenants, or tenants in common of them. Then with respect to the bill of exchange not having been accepted for the price, suppose the contract had been to deliver the goods on payment of a sum of money; certainly no property would pass till the money was paid. The stipulation in the present case was for what was as necessary for the plaintiff to receive, as if it had been ready money; because, by delaying to

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(a) *Suprà*, 2.—(b) 4 *Taun.* 24.

give the bills, which were to be made payable at a certain time, the day of payment was likewise delayed.

Mr. Serjt. *Lees*, in answer to the two cases which had been last cited, said, that *White v. Wilks* was a recent determination, and at all events only partially answered the present case; because there, the action was brought by the assignees of the purchaser against the vendor; in the present case, the action was by the vendor against the assignees of the purchaser. The case of *Jackson v. Anderson* had no reference to the present case, because that was a destination of different portions of money to different persons, and the mere accident of the money becoming mixed up together certainly did not make the different persons to whom it was destined, tenants in common.

The court took time to consider of the question, and on this day, the Chief Justice, after stating the case, delivered the opinion of the court.—The real question in this case is, whether on the 17th of *October*, when the bankrupt stopped payment, and notice was given to the wharfinger not to obey the order for delivery, the plaintiff had a right to rescind the contract; for if he had, the property still remained in him, and the defendant was guilty of a conversion; if he had not, the plaintiff cannot support his claim. This again depends on the question whether the delivery were complete; for if it were, the contract was executed; but if any thing remained to be done before the vendee could take possession, the contract might be rescinded. To decide this question we must look to what the defendant was authorised to do under the order for delivery, and what he actually did; for there was no authority to deliver it, except under that order. Now by the terms of the order, no authority was given to the bankrupt to receive the goods, till they had been weighed off; they had not been weighed off; and therefore, that which preceded the completion of the contract had

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not been complied with. We are confirmed in this opinion by the case of *Busk v. Davis*, which was decided in the *King's Bench*, in *Hilary* term, and of which we have been favoured with a note by my brother *Dampier*. That case, like the present, was an action of trover for some flax, and was brought by the vendor against the warehouseman, who had delivered the flax to the vendee. The flax, which was part of a larger quantity, had been sold to the vendee at 13 days; a delivery note was given to him by the plaintiff, and he was charged rent for warehouse-room from the 7th of *October*. On the 17th he stopped payment, and on the 19th the plaintiff gave notice to the defendant not to deliver the flax. It appeared that it was usual for flax to come over in mats of unequal weight; which were weighed at the time of the delivery. Nothing remained to be done to regulate the price; but the court held that the flax not having been weighed off, which both parties were concerned in doing, the delivery was incomplete. Mr. *Park*, for the defendant, relied on the authority of *Whitehouse v. Frost*. In this case, therefore, we are of opinion that the delivery was not complete; that the vendor was at liberty to counteract the order; and consequently, that the defendant was guilty of a conversion.

Judgment for the plaintiff.

Thursday,  
 June 16.

MABERLY v. ROBINS.

A. buys a house at an auction, and deposits part of the purchase money, the remainder to be paid upon the vendor's making a good title. It turns out that the vendor's title is good in law, but bad in equity:—Held, that A. is entitled to recover back the deposit in an action at law.

THIS action was brought to recover the deposit money for the purchase of a house in *Curzon* street, which had been put up to auction by the defendant, and had been

for the purchase of a house in *Curzon* street, which had been put up to auction by the defendant, and had been

bought by the plaintiff. One of the conditions of sale was, that the purchaser should immediately deposit £15 per cent. in part of the purchase money, and should at the same time sign an agreement for the remainder, *upon having a good title made out* at the vendor's expence. The plaintiff accordingly paid down the sum of £1800, being a deposit of £15 per cent. and signed an agreement for the remainder, as above. At the trial of the cause before Lord Chief Justice *Gibbs*, at the sittings in this term, it appeared that the vendor's title to the premises was good in law, but not in equity. The jury, accordingly, found a verdict for the plaintiff for the amount of the money which he had deposited, with interest for the same from the time of the deposit; the defendant having liberty to move to enter a nonsuit, if the court should be of opinion that the action was not maintainable, or to reduce the damages, if they should decide that interest was not recoverable upon the deposit.

Mr. Serjt. *Lens*, accordingly, now moved for a rule *nisi*. He contended that, as the plaintiff had objected that no equitable title had been made to the house in question, he should have had recourse to a court of equity. A court of law could take no notice of an equitable objection; it was a sufficient answer to an action at law, that a legal title had been made out. He cited *Alpass v. Watkins* (a), where Lord *Kenyon* held that, sitting in a court of law, he could not take notice of an equitable title, a good legal title having been established. He admitted, however, that there was a later decision in this court, which went against the present application; that of *Elliot v. Edwards* (b), which was an action like the present, to recover the deposit on the purchase of premises, there being an equitable objection to the vendor's

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(a) 8 T. R. 516.—(b) 3 B. and P. 181.

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title ; Lord *Alvanley* held that if the purchaser would be liable in equity, that was a sufficient objection to completing the purchase.

Lord Chief Justice GIBBS.—The question is, whether the contract were merely for a good legal title, or for a legal and equitable title. Now the words of the condition are that a good title shall be made out at the vendor's expence. What can the meaning of that be, except that there shall be a good title both at law and in equity? The vendor, therefore, not having made out a good equitable title, the contract on the part of the defendant is broken. It is true that we are in a court of law, but we are on the question, whether the contract have been complied with. According to the defendant's doctrine, if an estate be devised to *A. B. and C.*, it might be sold by *A. and B.* only ; since they could give a *legal* title to it without the concurrence of *C.* And if this principle were to be followed up, the defendant might bring an action for the remainder of the purchase money.

The rest of the court concurred with his lordship's opinion, Mr. Justice *Chambre* observing that there was no reason why questions respecting equitable titles should not come incidentally before a court of law. The rule, therefore, as far as respected the nonsuit, was

Refused.

As to the motion for reducing the damages, the Chief Justice observed that the *King's Bench* had decided that interest on a deposit could not be recovered under the count for money had and received, but that it might on a special count. If that doctrine were correct, the plaintiff might recover it in this case as damages, because he had certainly lost the interest from the time he had made the deposit. A rule *nisi* was, however, granted on this ground, and on a subsequent day, Mr. Serjt. *Best*, on the

part of the plaintiff, consented that the verdict should be reduced to the amount of the sum deposited.

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DE PONTHEIU V. PENNYFEATHER.

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THIS was an action of trespass for cutting down, breaking, carrying away, and converting the gates, posts, and paling of the plaintiff's close, and treading down and destroying the crop and herbage thereof. The defendant pleaded, *first*, the general issue; *secondly*, that there was a common and public footway into, through, over, and along the close, and that they cut down the gates, &c. as obstructing it. The replication alleged that the said footway had, previously to committing the trespasses, been duly diverted and turned by an order of justices of the peace, and a new one in lieu thereof, more commodious, had been set out, completed, and put in good condition and repair, and thereupon the original footway had been stopped up, and the soil thereof sold to the plaintiff; traversing that there was any such footway as in the plea mentioned. The rejoinder took issue on these facts. The cause came on to be tried at the last spring assizes for the county of *Surrey*, when a verdict was taken for the plaintiffs, subject to the opinion of the court on the following case.—The trespass complained of was admitted, and the question arose on the validity of the order of justices, by which the footway had been diverted and turned. The order and other proceedings had been duly returned to the clerk of the peace for the county of *Surrey*, and were placed among the rolls of the court, but were never actually entered or transcribed upon a roll;

Where an order of justices for the diversion and turning of a road, recites that they had viewed the new road and found it to be in good condition and repair, held to be a sufficient certificate thereof under stat. 13 Geo. 3. c. 78. s. 19.—If the certificate be deposited with the clerk of the peace, that is an enrolment of it within the same sect.—Where a road is stopped up by order of justices, and a new one is substituted, partly over the ground of a stranger, and partly over an accustomed road, that is a sufficient compliance with the act, provided the new road convey the public to the same place as the old one did.

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(no records of the court of *quarter sessions* being so entered.) They consisted, 1st, of the consent of *W. Alder*, the owner of the land over which the new road was made, that, in consideration of his receiving 95 yards of the old footway, and of the sum of £50, the new road should be made and continued through his land. 2dly, The order of justices, dated the 15th of *June*, 1812, whereby, after reciting "that they had, upon view, found that a
 "certain part of a public footway or highway in the
 "parish of *Esber*, lying between *Hare lane* and the
 "parish of *Esber*, and leading from the lands of *C. R. E.*
 "to *Esber*, of the length of 540 yards, might be diverted
 "and turned, so as to make the same more commodious
 "to the public; and had viewed a course proposed for
 "the new footway in lieu thereof, through the grounds
 "of *W. Alder*, of the length of 295 yards, leading from
 "the lands of *C. R. E.* to a certain other public way in
 "the parish of *Esber*, called *Claremont lane*; and had
 "received evidence of the consent of *W. Alder* to the
 "new way being made through his lands; and had
 "viewed the new way, and had found it to be in good
 "condition and repair;" they did thereby order that the said public footway or highway should be diverted and turned through the lands aforesaid. 3dly, An order, dated 16th *June*, by three of the justices by whom the order of the 15th of *June* was made, by which, after reciting that they were satisfied that the new way was properly made, and fit for the reception of travellers, it was ordered that the old way of 540 yards should be stopped up, and that 445 yards thereof should be sold to *John De Pontbieu*, Esq., and the remaining 95 yards to *W. Alder*. The land was, accordingly, afterwards sold in that proportion. The defendant appealed at the next *quarter sessions* against the order of the 15th of *June*, when that order was affirmed. It was admitted that, by the new

arrangement, passengers might pass from *Hare lane*, to *Esher*, by going on the new footway into *Claremont lane*, and along that to the village of *Esher*. If the court should be of opinion that these orders and proceedings were good and sufficient for diverting, turning, and stopping the said footway, then the verdict was to stand; otherwise, a nonsuit to be entered.

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The case came on for argument on this day, when the *Solicitor-General*, on the part of the defendant, stated his objections to be threefold: *First*, that there had been no certificate that the new footway was in good condition and repair, according to stat. 13 Geo. 3. c. 78. s. 19. (a); *secondly*, that if the second order recited in the case were to be considered as a certificate, still there had been no enrolment of it in the court of *quarter sessions* as required by that section; *thirdly*, that if both the former objections should be decided in favour of the plaintiff, the justices had not made a new way to answer to the old road; because, though it ultimately led to the same place, yet it was partly through an old road which was before open to the public. In support of the last objection, he cited *Welch v. Nash* (b), where the court of *King's Bench* held that, under this section of the act, it was not sufficient that the old road should have been *widened*, so as to answer the purpose of a new road, Lord *Ellenborough* observing that the whole section contemplated that a new

(a) That section, after enacting "that highways, &c. may be turned by the justices at their special sessions, with the consent of the owners of the lands, if the new ways be more convenient to the public, and that the old ways may be stopped up and inclosed," provides further, that "no such inclosure or stoppage shall be made until such new ways shall be completed and put into good condition and repair, and so certified by two justices of the peace upon view thereof; which certificate shall be returned to the clerk of the peace, and by him enrolled among the records of the court of quarter sessions."

(b) 8 East. 394.

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highway was to be made instead of the old one; and that the magistrates could only order the old way to be stopped up, on condition that a new way had been made and put in a proper state.

Mr. Serjt. *Best*, for the plaintiff, contended that every thing had been done which the act required. *First*, as to the certificate; the recital of the order of the 15th *June*, he said, not only contained in effect the certificate prescribed, but it was the very form which was contained in the table of forms, No. 18, which was the form of an order for stopping up old highways. There was no form of a certificate specified for the order for diverting and turning an old way. *Secondly*, he insisted that the act, in directing that the certificate should be enrolled among the records of the *quarter sessions*, did not mean that a transcript of the order should be enrolled, but that the roll itself should be taken and put among the records. He compared it to the case of bargain and sale of lands (a), except that there the deed itself is wanted, and therefore it is taken away; in the present instance, it was not wanted, and therefore it was left with the clerk of the peace. There were many acts, he said, which required the orders of justices to be enrolled in the court of *quarter sessions*, and they were all enrolled in this way; unless, therefore, the defendant could adduce some authority, the court would hesitate before they gave a decision which would overturn almost every order of the court of *quarter sessions*. *Thirdly*, he admitted that there must be a new way made, according to the decision in *Welch v. Nash*. But in that case, there was no new way, the old road was not turned, nor even widened all the way;

(a) Which, by stat. 27 *Hen.* 8. c. 16. must be by indenture sealed and enrolled in one of the courts of record at *Westminster*, or before the *custos rotulorum* and two justices of the peace of the county in which the lands lie.

though if it had been so widened, that would not have been sufficient. Here, on the contrary, there was a new road, because it was carried over the lands of a person where the public had no right of way before; and the justices had said that they had given a more commodious way to the public.

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The *Solicitor-General*, *contra*, insisted as to the *first* objection, that there should have been an express certificate, and not a mere recital in the order. It did not follow that, because the act did not give the exact form for each case, the party should not be obliged to return a certificate when required; it was, he said, an instrument of great importance.—*Secondly*, the enrolling proceedings, he said, was a very different thing from filing them; many things were filed which were not enrolled. An instrument did not become matter of record by being filed, but by being enrolled. With regard to the crown, for instance, it would not be sufficient to leave the record in the office of the court; but there must be an actual enrolment of it; that is, it must be made matter of record. As to the bargain and sale of lands, it was evident, he said, that the enrolment was distinct from the original instrument, because by stat. 27 *Hen.* 8. c. 16., the enrolment was to be made within six months after the date of the indenture; and it had been decided that the enrolment must be on parchment. If the act had only intended the certificate to be carried to the clerk of the peace, it would not have proceeded to say that it must be enrolled. A person would have a right to insist on the act being complied with, in order that he might know who he was to indict, if the road should be out of repair. *Thirdly*, the case of *Welch v. Nash* had decided that, under this act, an old way could not be stopped up, unless a new way were set out as a compensation for it; the new road must go to the same place as the old. It

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could not therefore be contended that, if the new way did not go the whole length of the old, the act had been complied with. Now the new road did not go to the spot to which the old road had gone, but only into *Claremont lane*, which was a carriage road, and perhaps not so convenient for foot passengers as a footway. As far as the new road went over the land of *W. Alder*, he admitted that there had been a compensation. One object of the act was, that the public should not be deprived of a road, without having one in return which no one could dispute: Suppose part of *Claremont lane* were not a public way. If this doctrine could be supported, a foot way of 100 yards might be substituted by another of one foot, made up with a road over which the public had a right of passing before. [Mr. Justice *Heath*.—Is not this matter of appeal?] If it had been a question of *commodious* or *not commodious*, he admitted it would have been matter of appeal. But he contended that a road had not been given in lieu of that which had been taken away; and that the public had a right to expect one entire new way to the place to which they went by the old road.

Lord Chief Justice GIBBS.—The courts have considered that this act gave the magistrates a new jurisdiction, and they have taken care that the magistrates do not exceed the limits of it; and they have trusted to the integrity of the magistrates as to those things, which have been left to their discretion. There are three objections made by the defendant in this case. As to the *first*, I am of opinion, looking at these orders, that what is prescribed by the act has been done; that is, two justices have certified that the new way was in good condition and repair. *Secondly*, as to the objection that the certificate should have been enrolled, there are two answers to that, the last of which is quite conclusive; the one is, that it is very doubtful whether the act meant any thing more than that

the certificate should be placed amongst the records. I think that is sufficient. But at all events the statute is only directory; and it is impossible to say that the neglect of the clerk of the peace would make those who travel the road trespassers. *Thirdly*, it is contended that a road has been taken away to which the public had confessedly a right, and they are therefore entitled to have one in return, to which they shall have an equal right; not a road partly over the land of another, and partly through an old road, but the order of justices must give an entirely new road. I do not think that the act had any such intention, but that if the public be carried to the point of destination, partly by a new road and partly by an old one, the meaning of the act has been complied with, and the magistrates were justified in shutting up the old way. I am of opinion, therefore, that all the objections are overruled.

Per Curiam,

Judgment for the plaintiff.

DOWN and others v. CREWE.

Wednesday,
June 22.

Mr. Serjt. Onslow moved in last term for leave to sue out a *distringas* to compel the appearance of the defendant in this cause, on an affidavit, which stated it to be the belief of the plaintiff's attorney, that the defendant had absconded to avoid being served with process; without stating the grounds of such belief (a). The Chief Justice, on that occasion, observed that there had arisen a little

On motion for leave to issue a *distringas* under stat. 51 Geo. 3. c. 124, the party moving must swear that he believes that the defendant absconds to avoid being served with process; and also his reason for such belief.

(a) By stat. 51 Geo. 3. c. 124. s. 2., it is enacted, "that no writ of *distringas* shall issue for default of appearance, but the defendant shall be personally served with the summons or attachment,

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confusion on this subject. The court had said that they would not grant a *distringas*, except upon an affidavit which stated that the party believed the defendant to have absconded (a). An impression had been received from that resolution, that if there were that affidavit, that was all that was necessary. The rule, however, his lordship took to be, that the affidavit must state both a belief that the defendant absconded, and also the ground on which that belief was supported. The rule was accordingly then refused; and on this day, on Mr. Serjt. *Onslow's* producing an affidavit shaped according to his lordship's direction, the court

Granted the rule.

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" with a notice of the meaning thereof. But if it shall appear to  
 " the satisfaction of the court that the defendant could not be so  
 " personally served, and that such process had been duly executed  
 " at the dwelling-house or place of abode of such defendant, the  
 " plaintiff, by leave of the court, may sue out a writ of *distringas*  
 " to compel the appearance of such defendant. And if the defend-  
 " ant do not appear at the return of such *distringas*, the plaintiff  
 " may proceed as if he had appeared."

(a) Mr. Serjt. *Best* moved for a *distringas* in the last term, on an affidavit which stated that the officer had received back the writ which had been served on the defendant, in a letter acknowledging the receipt of it, but which affidavit did not state a belief that the defendant had absconded: The Chief Justice then said that the application was made on a ground which was not within the statute; that act having been passed to prevent writs of *distringas* from being issued without previous application to, and a rule by, the court for that purpose, except where the party had been actually served; on these applications, the court required the affidavit to state a belief of the defendant's absconding; in the case then before the court, the affidavit stated that he had been actually served. If so, the plaintiff might proceed and enter an appearance at his peril; but there was no ground for issuing a *distringas*.

CROFT v. PITMAN.

Wednesday,  
June 22.

THE *Solicitor-General* shewed cause against a rule which had been obtained by Mr. Serjt. *Lens*, calling on the plaintiff to shew cause why the defendant should not enter a suggestion on the roll, that he was resident in the city of *London*, and that the debt was under £5, by virtue of stat. 39 and 40 *Geo. 3. c. 104.* (local act). The facts were that the defendant slept and resided in *Southwark*, where he carried on the business of a coal-merchant, but rented the half of a counting-house in the city of *London*, for the purpose of receiving orders, and occasionally transacting other business. He cited *Gray v. Cook* (a), where the court of *King's Bench* held that a market gardener, who rented a stand and shed in *Fleet-market*, which he occupied three times a week only, was not within the meaning of the act. He also cited *Miller v. Williams* (b), in which Lord *Ellenborough* held that where a man's residence was out of the jurisdiction of the court of requests, his occasionally underwriting at *Lloyd's*, where he had a seat, did not subject him to that jurisdiction. So in *Skinner v. Davis* (c) this court decided that a person plying as a porter in the city of *London*, and resorting to a house of call there, but not lodging in the city, was not within the act.

Lord Chief Justice GIBBS.—It has been enacted (d) that a person renting a shop or stall shall be within the jurisdiction, and I cannot distinguish between the case of a man renting it by himself, and with another person. In the present case, the defendant's interest always remains; it is therefore distinguishable from the case of *Gray v. Cook*.

(a) 8 *East*. 336.—(b) 5 *Esp. Rep.* 19.—(c) 2 *Taun.* 196.

(d) By 14 *Geo. 2. c. 10.*

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Mr. Justice DALLAS.—He receives orders at his counting-house; and if so, he must be said to carry on his business there.

Mr. Justice HEATH and Mr. Justice CHAMBRE concurring,

Rule absolute.

Wednesday,
 June 22.

The KING v. the SHERIFF of MIDDLESEX, in a cause of
 THOMPSON v. POWELL.

Where a rule to return a writ, issued out of this court, expires in vacation, the sheriff must file it at the return, and cannot wait till the ensuing term; the *Common Pleas* office being open during the vacation.

It appeared by the affidavits in this case, that the sheriff was served with a rule to return a writ of *capias ad respondendum*, which is a four day rule, on the 20th of May. *Easter* term ended on the 23d of May, so that the last of the four days expired in the vacation. The sheriff, conceiving that he was not bound to file a returned writ in the vacation, filed it at the opening of the court, on the first day of the present term, on which day the plaintiff moved for an attachment against him for not returning the writ pursuant to the rule.

Mr. Serjt. *Best*, on a former day, obtained a rule *nisi* to set aside this attachment, on the authority of *The King v. The Sheriff of Berkshire* (a), where the court of *King's Bench* held that if a writ of *fieri facias* expire in the vacation, the sheriff need not return it till the first day of the ensuing term, and has the whole of that day to file it in.

Mr. Serjt. *Vaughan* now shewed cause against the rule, and said that the practice of the *King's Bench* was dif-

(a) 5 *East*. 386.

ferent from that of the *Common Pleas*; and on appeal to the officers of the court, Mr. Secondary *Griffith* said that, when the rule expired in vacation, the *Common Pleas* office being in the *Temple*, and open all the vacation, he apprehended that a party was entitled to his attachment on the first day of the ensuing term.

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THE KING
v.
THE SHERIFF
OF MIDDLESEX.

Mr. Serjt. *Best*, *contra*, urged the inconvenience and confusion which would arise from introducing a practice into this court, different from that of the *King's Bench*. The writs, he said, were supposed to be returned into the court, and the sheriff was supposed to have an office in court for the purpose of returning them; how then could they be returned except in term time? The case of *The Sheriff of Berkshire* had been decided on principle, and if that decision were correct, the rule must be the same in this court.

Lord Chief Justice GIBBS.—The rule on which the case of the *Sheriff of Berkshire* was decided is not the rule which is now in question. The rule which must govern this case is that of 8 *Geo. 1.* by which the sheriff is to return the writ in four days. If he cannot do that, by reason of the four days expiring in vacation, he must return it on the first day of the ensuing term; but if he can do it in vacation, and do not, he will be in contempt. Now in this court the office is open in vacation; it is not open in the *King's Bench* except in term time. The *King's Bench*, therefore, differs from this court, not because they go on different principles, but because this court can do what the former cannot.

The rule would accordingly have been discharged; but the writ having been actually returned, and no trial having been lost, the court set aside the attachment, on payment of costs.

Saturday,
June 25.

ROGAN v. LEE.

In the notice to appear required by 5 Geo. 2.

c. 27. s. 1. to be written at the bottom of the copy of process served on the defendant, the year, as well as the day of the month, must be in words at length.]

MR. Serjt. *Vaughan*, on a former day, obtained a rule to shew cause why the proceedings in this action should not be set aside for irregularity, on the ground that the year of our Lord, in the notice to appear, at the bottom of the writ of *capias*, was in figures instead of words at length (*a*).

Mr. Serjt. *Pell*, on a subsequent day, shewed cause, and contended *first*, that it was not necessary to state the year at all, on the authority of *Elliot v. Parrot* (*b*), where on the copy of the *capias* was a notice subscribed to appear at the return, being the 26th of *June*, without the year; and the court held that that was sufficient, exploding the former doctrine on the subject. The objection here, then, was, that that which, by the case cited, was unnecessary to be stated at all, had been stated in figures. But, *secondly*, if it were necessary to be inserted, he contended that it was sufficient to state it in figures. He distinguished this from the case of *Pinero v. Hudson* (*c*), because there, the day of the *month* was in figures. In *Steel v. Campbell* (*d*), this court refused

(a) By stat. 5 Geo. 2. c. 27. s. 1. It is enacted "That the writ, process, declaration, and all other proceedings, shall be in English, and written in words at length," and by the 4th section, "That upon every copy of such process to be served upon any defendant, shall be written in like manner, in English, notice to the effect following: A. B. You are served with this process, to the intent that you may by your attorney appear in his majesty's court of _____, at the return thereof, being the _____ day of _____; in order to your defence in this action."

(b) *Barnes*, 425.—(c) 1 *M. & S.* 119.—(d) 1 *Taun.* 424.

to set aside the proceedings, on the ground that the notice at the foot of the process required the defendant to appear on a return day in an impossible year. That case, though not exactly similar to the present, at least proved that where the year was not stated so as to mislead the defendant, it was immaterial how it was stated.

Mr Serjt. *Vaughan*, *contra*, insisted that, both from the language of the statute, and on authority, the objection was fatal. The first section of the act required that the process should be in words at length; the fourth section enacted that the notice should be written *in like manner*; and these words could have no other meaning, but that the notice should also be written in words at length. There was a wide difference, he said, between putting no year at all, and inserting it not conformably to the statute. Many things which, in pleading, were not necessary to be introduced, must, if inserted, be conformable to the rules of pleading. Neither *Elliot v. Parrot*, nor *Steel v. Campbell*, he said, were applicable to the present case; or if they were, they had been decided previously to that of *Pinero v. Hudson*. But he mentioned a case of *Williams v. Jay*, which had lately been decided in the *King's Bench*, which was exactly in point. The court took time to enquire into the circumstances of this case, and on this day

Lord Chief Justice GIBBS delivered the opinion of the court.—The case which has been cited as having been decided in this court, did not turn on the point which is now in question. We have been favoured with a note of *Williams v. Jay (a)*, in which the court of *King's*

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(a) Hil. 54 Geo. 3.

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Bench held that the year, as well as the month, must be in words at length, and that the service of the process was bad, unless it were so. Indeed, in every view of the case, supposing that the day of the month must be at full length, the year ought to be so likewise. As to the statute, it does not follow that, because the year is not particularly mentioned, it was not intended to be at length, as well as the day of the month; at all events it is doubtful, for there is a blank left in the statute for the whole of the date. But even if the statute did not require the year to be stated, yet if the party chuse to insert it, it must be inserted at full length. Both on principle, therefore, and on authority, we are of opinion that the service must be set aside.

Rule absolute.

Monday,
 June 27.

JONGE v. MURRAY and another.

Where a defendant is held to bail on a writ issued against himself and another, and the plaintiff declares against one only, the court will set aside the declaration and subsequent proceedings.

Mr. Serjt. *Vaughan*, on a former day in this term, obtained a rule *nisi* to set aside the declaration and proceedings in this cause for irregularity, on the ground that the defendant had been arrested and held to bail on a writ of *capias ad respondendum*, issued against the defendant and one *W. N. H.*, and that a declaration had been delivered against the defendant *Murray* alone, no process of outlawry having issued against the said *W. N. H.*

Mr. Serjt. *Best* now shewed cause against the rule, and contended that a variance between the writ and declaration was the subject of plea in abatement, and not of motion; or, at least, that the application should have

been to set the defendant at large, on filing common bail. He cited *Spalding v. Mure* (a), where an original writ was sued out against three, as surviving partners of a fourth, with another set of counts against them in their own right: One of the defendants was held to bail for money received by the four partners. The declaration was against the three defendants, without saying that they were the surviving partners of the fourth. The court refused to set aside the proceedings for irregularity, but permitted an exoneretur to be entered on the bail-piece.

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v.
MURRAY.

Lord Chief Justice GIBBS.—In that case, the fourth partner was never made a defendant; and the objection was that the process was against three, as surviving partners, and that the declaration was against them in their own right. The ground on which we granted the rule *nisi* in the present case was, that one had been made a defendant in the writ, who had not been declared against, and that the plaintiff could not sue out bailable process against two, and declare against one only; indeed there is no case where that has been permitted, unless one of the defendants have been outlawed. In *Chapman v. Eland* (b), this court set aside the declaration, after the defendant had taken it out of the office, on this ground. And the court of *King's Bench* did the same thing in *Moss v. Birch* (c).

Per Curiam,

Rule absolute.

(a) 6 T. R. 362.—(b) 2 N. R. 82.—(c) 5 T. R. 722.

Monday,
June 27.

CONNOR v. SMITH.

By charter-party, the freighter covenants with the owner to ship a cargo at *Oporto*, and to dispatch the ship with the first convoy for *England*, within fourteen working days after she is ready to receive her cargo : It is also agreed, that the freighter may detain the ship, for loading, for fifteen running days after the fourteen, paying for the fifteen at a certain rate. The first convoy sails after the expiration of the fourteen days, and before the end of the fifteen.—Held, that the covenant to sail with the first convoy is restricted by the agreement for the fifteen days ; and therefore that the defendant is not liable to pay for the detention after the fifteen days.

THIS was an action of covenant on a charter-party, made the 18th of *Nov.* 1809, between the plaintiff of the one part, and the defendant on the other, by which the plaintiff, as owner of the ship *Nimble*, covenanted with the defendant as freighter thereof, that the vessel, having received her cargo, should sail with the first convoy bound for *Oporto*:— That having discharged her cargo there, she should take on board from the freighter, or his correspondents, a full and complete cargo of wine and cork ; and being so loaded, and afterwards dispatched, should proceed with the first convoy that should sail from *Oporto* for *England*, fourteen working days after the said vessel should be ready to take on board her cargo to the port of *London*. On the other hand, the defendant, as freighter, covenanted with the plaintiff, among other things, to ship a cargo of wine and cork on board at *Oporto*, and to dispatch the vessel with the first convoy for *England*, within fourteen working days after the vessel should be ready to receive her cargo. And it was thereby declared and agreed that it should be lawful for the freighter to detain the vessel, for loading the cargo at *Oporto*, fourteen working days, if required, to commence from the day after notice given that the vessel was ready to take in her cargo ; and also to detain the vessel fifteen running days more on demurrage, if required, paying therefore at the rate of four guineas *per* day. The defendant suffered judgment to go by default, and on the execution of the writ of inquiry, it was proved that the ship arrived at *Oporto* on the 20th of *January* 1810, and completed her unloading on the 2d of *February* following, when the plaintiff gave notice to the defendant's agents, that he was ready to re

ceive his cargo under the charter-party:—That the first convoy after that notice sailed on the 23d of *February*, before which time the fourteen working days mentioned in the charter-party, exclusive of four holidays, had elapsed: That the defendant's agents did not begin to load till *March*, and that the cargo was not completed till the 14th of *April* following: That the next convoy, after that of the 23d of *February*, sailed on the 16th of *April*, and that the ship sailed with that convoy.—The plaintiff sought to recover the fifteen running days, at the rate of four guineas per day; and also damages for thirty-eight days' detention of the ship; being from the 7th of *March*, on which day the fifteen running days expired, up to the 14th of *April*, when the vessel completed her loading; making in all the sum of £222: 12s: A verdict was taken for that amount, by the consent of both parties, subject to be reduced, if the court should see fit to do so.

Mr. Serjt. *Best*, accordingly, on a former day in this term, moved that the damages should be reduced from £222: 12s, to the sum of £63, being the amount of the demurrage for the fifteen days, at the rate of four guineas per day. He contended that, as the plaintiff had a right to detain the ship fifteen days after the fourteen running days, provided he paid the stipulated sum, the clause in the charter-party, by which the ship was to sail with the first convoy, must be considered as qualified by that right, and the plaintiff, therefore, had sustained no actual damage by the detention. A rule *nisi* being granted,

Mr. Serjt. *Vaughan* was now to have shewn cause, but the court were unanimously of opinion that the covenant to sail with the first convoy was restricted by the subsequent agreement, that the defendant should be at liberty to detain the ship fifteen running days, and that the defendant was therefore entitled to twenty-nine

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CONNOR
v.
SMITH.

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days in all, paying four guineas *per* day for the last fifteen.

Rule absolute to reduce the verdict.

Tuesday,
June 28.

BLACKBURN v. KYMER.

Where a writ of error is sued out before final judgment, the four days for putting in bail in error, are to be reckoned from the time when the taxation of costs is completed by the insertion of the sum.

THE *Solicitor-General*, on a former day in this term, obtained a rule *nisi* to set aside the writ of execution, which had been issued in this cause, for irregularity, with costs, on the ground that it had been issued pending a writ of error. It appeared that the writ of error had been issued returnable in this term; that on the 10th of *June*, the prothonotary commenced the taxation of the plaintiff's costs in the original action, and delivered the bill thereof to the plaintiff's attorney (a); that on the same day, a copy of the allowance of the writ of error was served on the plaintiff's attorney; that on the 13th of *June*, the defendant's attorney agreed with the plaintiff's attorney on the amount of the costs, and on the day following received an account of the prothonotary's allocatur thereon; that bail in error were put in, and notice thereof served on the plaintiff's attorney, on the 17th of *June*; and that execution issued against the defendant's goods on the same day. The question was, whether bail in error had been put in in due time. The rule in both courts is, "that no execution shall be stayed upon writs of error, in cases where special bail is

(a) The practice is for the prothonotary's clerk, at the commencement of the taxation, to prepare the prothonotary's allocatur of damages and costs, leaving a blank for the amount of the latter, to be filled up when that amount is ascertained, and dating it as of the day when he makes this minute.

required, unless the plaintiff in such writ of error shall, within four days after the delivery thereof, (i. e. to the clerk of the errors) put in bail according to law (a).” The Chief Justice said that the construction of this rule was that, if the writ of error be allowed before final judgment, bail must be put in within four days after judgment is signed (b); if after final judgment, bail must be put in within four days after the *allocatur* (c).

Mr. Serjt. *Lens*, on a subsequent day, shewed cause, and contended that the bail had been put in too late. He insisted that final judgment must be considered as signed at the time when the prothonotary commenced his taxation of costs, which was on the 10th of *June*; and that as the allowance of the writ of error was served on the plaintiff’s attorney on the same day, the four days allowed by the rule had, on any view of the case, expired before the 17th of *June*, when bail were put in.

The *Solicitor-General*, *contra*, insisted that judgment could not be said to be finally signed, till the amount of the costs had been inserted. The *allocatur*, he admitted, had been drawn up, as far as it could be without putting in the sum, on the 10th of *June*; that, however, was the most essential part, for it was impossible for the plaintiff in error to put in bail, until he knew the sum for which his bail were to become responsible. He contended, therefore, that final judgment was not signed till the 13th of *June*, when the amount of the costs was inserted; that the bail, having been put in within four days afterwards, were in time; and consequently that the writ of error operated as a *supersedeas*.

Cur. *adv. ult.*

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v.
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(a) *R. Mic. 28 Car. 2. C. P. and Hil. 36 Car. 2. K. B.*

(b) *Jaques v. Nixon*, 1 *T. R.* 279.—(c) *Gravall v. Stimpson*.
1 *B. & P.* 478.

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On this day the Chief Justice delivered the opinion of the court.—The question in this case reduces itself simply to this: When a writ of error is sued out before final judgment signed, what is to be considered as the signing final judgment? On the one hand it is contended that the commencing to tax the costs *de incremento*, is signing final judgment; on the other hand it is insisted that it is not till the prothonotary's allocatur is completed, by the insertion of the amount of the costs. The argument which was used in support of the latter proposition, carries great weight with it; for if bail must be put in before the amount of the costs be ascertained, the bail would not know the sum for which they were becoming responsible. The four days, therefore, must be reckoned from the time of completing the taxation of costs. There is no case exactly in point, but the court of *King's Bench* concur with us in our opinion.

Rule absolute.

Tuesday,  
 June 28.

PRINCE P. NICHOLSON.

To an action against an executor for goods sold to the testator, the defendant, at *nisi prius*, pleads a plea, *puis darrein continuance* of judgment recovered in a plea of debt on the simple contract of the testator, commenced

since the present action.—On demurrer, held 1st, that it was no answer to this plea, that the judgment pleaded was in a plea of debt on the testator's simple contract; and 2d. that the plea was not invalidated by the defendant having suffered judgment to pass against him voluntarily.

To this action, which was against an executor for goods sold and delivered to the testator, the defendant pleaded *non assumpsit*, and the cause was set down for trial, at the sittings in *Michaelmas* term last, at *Guildhall*. When the cause came on to be tried, the defendant tendered a plea *puis darrein continuance* of three judgments recovered against him, as executor, in the same term, in pleas of debt, which were commenced also in that term, for

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money borrowed by the testator in his lifetime; and *plene administravit præter* £300, the amount of those judgments:

—The late Lord Chief Justice *Mansfield*, who tried the cause, refused to receive this plea, and the jury found a verdict for the plaintiff. In *Hilary* term, the court set aside this verdict, on the ground that the judge had no power to refuse the plea, and that the defendant could only avail himself of any objection which he might make to the plea, by demurring to it on the return of the record in *bank* (a). The plaintiff, accordingly, demurred; shewing for causes, *first*, that by law, an action of debt on the simple contract of a testator or intestate, could not be maintained against the executor or administrator of such testator or intestate; and, therefore, that the judgments pleaded by the defendant since the last continuance, were erroneous, and such as the defendant might and ought to have reversed by writ of error, and was not bound to satisfy: And *secondly*, that it appeared by the plea, that the suits in which the judgments were supposed to have been recovered, were commenced at a time subsequent to the commencement of the present suit, and to the time of the defendant pleading in bar; and as the judgments could not have been recovered between that time and the time of pleading *puis darrein continuance*, except by confession, *non sum informatus*, or default, the defendant must have suffered these judgments to pass against him voluntarily, or by fraud, to defeat the plaintiff of the present action. The defendant joined in demurrer, and on a former day in this term it came on for argument.

Mr. Serjt. *Pell*, in support of the first objection, cited *Barry v. Robinson* (b), where this court decided that debt would not lie against an administrator, upon a simple

(a) See the report of this part of the case, *ante*, p. 70.

(b) 1 *New Rep.* 293.



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contract of his intestate, and where all the authorities on the subject were collected. That case, he said, must have been ultimately decided on the well-known principle of law, that an executor or administrator was unable to wage his law, as the testator or intestate might have done; and that, therefore, it would be giving the plaintiff an advantage, which he would not have had in an action against the intestate. As to the second objection, on which he principally relied, he contended that a judgment confessed could at no time, and in no instance, be pleaded by an executor, for the purpose of covering assets to the amount of that judgment. But after the executor had pleaded in bar, as in the present case, it would be productive of the greatest injustice, if he were to be allowed to plead such a plea, *puis darrein continuance*. The defendant had, by the general issue, pleaded that no cause of action ever existed; notice of trial was given, and the parties appeared to try this issue, which, if the trial had proceeded, he said, must have been found for the plaintiff. That plea was then abandoned, and admitted to be without foundation, and the plaintiff was precluded from recovering upon it by this plea of judgments confessed since the last continuance, after having been put to the trouble and expence of coming to trial on a plea, which the defendant must have known to have been false at the time he pleaded it. When a defendant asked for time to plead, one of the terms always was, that he should not confess a judgment: Arguing by analogy, the defendant in this case, he said, had no more right to confess a judgment and then avail himself of such confession, than if he had obtained time to plead.—[Mr. Justice *Heath*. How does it appear that these were not judgments by default? An executor is not bound to defend an action which is brought to recover a fair debt. Supposing these, therefore, to have been fair debts, it does not appear that

the executor has done any thing which he ought not to have done.] Admitting that the defendant; in this case, had suffered judgment to go by default, he contended that, though there was a distinction between judgment by confession and by default, inasmuch as in the former case the defendant was an *actor*, in the latter he was only passively a defaulter, yet the principle was the same in both cases. He ought to have pleaded the pendency of the present action. At all events the court would have granted the defendant time, where it was so obvious that there were several actions depending. He admitted that an executor had a right to give a preference to one of two debts of equal degree; but the courts, he said, were jealous of such power, and would take care that it should not be exercised to the prejudice of another creditor. Some of the old cases said that an executor might sometimes know that justice required one debt to be preferred to another, as in case of usury; but all such cases required that the preference should be given in the earliest possible stage of the proceedings. He cited Mr. Serjt. *Wilson's* edition of *Wentworth's Law of Executors*, p. 145. in support of his argument.

Mr. Serjt. *Copley*, *contra*, insisted *first*, that the judgment pleaded *puis darrein continuance* was not erroneous: He admitted that debt would not lie against an executor or administrator, on the simple contract of the testator or intestate, and for the reason given by the other side: But he contended that the executor or administrator must make his objection in the first instance, and could not avail himself of it by writ of error, or by motion in arrest of judgment. He cited *Edgecomb v. Dee (a)*, which was an action against an administrator, to which the defendant pleaded, among

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(a) *Vaughan*, 89.

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other things, judgments recovered in pleas of debt without specialty; to this the plaintiff demurred. It was there said, that the defendant might have demurred, and demanded judgment of the writ; but that it was not compulsory upon him to do so; and not having done so, the judgment of the court was conclusive upon the executor, and was a good bar to the plaintiff's action. The subject was very fully discussed in that case, and many authorities were cited; 10 *Hen. 6. 24 b. 25 a*; *Germyn v. Rolls (a)*, to show that, if the executor do not plead in abatement of the writ, but confess the action, or plead other matter which is found against him, he shall have no other remedy. In *Seaman v. Dee (b)*, Lord Hale held that debt upon simple contract would lie against an executor, *if he pleased*; so *Popham 32*, and *Palmer v. Lawson (c)*. But *secundum*, even if these judgments were erroneous, at all events they might be pleaded till reversed, according to *Horsy v. Daniel (d)*. *Thirdly*, he contended that the defendant had a right to pay one creditor in preference to another, in support of which assertion, he cited *Veale v. Gateston (e)*, where it is said that if the recovery be for a legal cause of action, it cannot be said to be covinous, although it was by consent, and with intent to prevent another of his debt. This doctrine, he said, was admitted in *Talbot v. Wells (f)*, and had been carried so far as to prevail even in equity (g). *Fourthly*, as to the necessity of pleading this before pleading in bar, that could only be taken to mean where the defendant had had an opportunity of so pleading it. In *Paris v. Salkeld (h)*, it was said that there was no difference between a plea *pais darrein continuance* and any other defence, except

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(a) *Cro. Eliz.* 425 and 459.—(b) *Fent.* 198.—(c) 1 *Lev.* 200.  
 (d) 2 *Lev.* 161.—(e) *Sir Wm. Jones*, 91. 3d resolution.  
 (f) 1 *M. and S.* 407.—(g) *Waring v. Danvers.* 1 *P. Wms.* 295.—(h) 2 *Wils.* 137.

this, viz. that the fact which warrants this plea must first have existed since the last, and before the next continuance. The time for pleading, therefore, never expired before verdict. The defendant had bound himself to no particular period, and the very circumstance of the rule for time to plead imposing, in general, as a condition, that the defendant should not confess a judgment, was a proof, he said, that where there was no such restriction, the defendant might plead at any time. In support of this position he cited *Hughes v. Pellett (a)*. As to the general issue being a false plea, it was true, he said, at the time it was pleaded. [Lord Chief Justice *Gibbs*.—There is nothing in that objection. I do not consider the general issue as a false plea.]

Mr. Serjt. *Pell*, in reply, said that there was no case in which an executor had been allowed to plead a judgment confessed, or by default, after having pleaded in bar; and this was a strong argument in favour of the plaintiff, because the case must often have occurred. The principal objection was, that the plaintiff, by this plea, was placed in a situation in which he ought not to be placed: Having got a certain priority, he ought not to be turned round on such a plea. There was no instance where such a plea had been available against third persons. As to the question what he might have pleaded, he answered that by saying that he might have applied to the court. The court, he said, would look with jealousy on a judgment obtained, not to say confessed, in so late a stage of the cause. The main ground, however, on which he rested his argument, was, that there was no case where a plea of this nature had been put upon the record, and that it would be attended with manifest injustice to the plaintiff.

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(a) *Barnes*, 330.

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Lord Chief Justice GIBBS.—This is a case of great importance : On the one hand, there is no authority for such a plea ; on the other hand, there will be manifest inconvenience in disallowing it. I shall say no more at present ; but if necessary, we will direct another argument.

Cur. adv. vult.

On this day, the Chief Justice delivered the opinion of the court.—One point in this case is of general importance, and great difficulty ; and if we could have expected that any additional light would have been thrown on the subject by further discussion, we would have directed a second argument. But the case has been very well argued, and all the cases have been cited which could be collected. We are the rather inclined to give judgment this term, in order that the party who thinks the judgment wrong may bring his writ of error.—This is an action of *indebitatus assumpsit* against an executor, and was commenced in *Trinity* term, 1813 : In that term, the defendant pleaded *non assumpsit testator* : In *Michaelmas* term the cause was ripe for trial, and came on at the last sittings in that term ; the defendant then pleaded three judgments recovered against him, as executor, since the last continuance, and *plene administravit præter* £300. It is not stated in the plea, on what ground these judgments were recovered, whether by *nil dicit*, or *non sum informatus* ; but merely that they were on debt on simple contract, and that they were recovered in that term. To this plea the plaintiff has demurred for two causes ; first, that the judgments were erroneous, because they were on debt on simple contract, and that the defendant, therefore, should have resisted them. To this it is answered that, though this would certainly have been an answer to the actions, yet, if the defendant did not avail

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himself of it in the first instance by demurring, he could not make use of the objection at any subsequent time; and the case of *Edgeworth v. Dee*, which has been cited from *Vaughan*, sustains that position. The second objection is of greater difficulty, and of more serious importance, viz. that the executor, having pleaded in chief, could not plead another judgment recovered against him, as executor, since the last continuance, because such judgment must have been suffered voluntarily. In order to weigh this objection, we must look to the situation in which executors would be placed, if this objection were to be allowed. In the administration of assets, there is no doubt but that it is in the discretion of the administrator to say whether a claim ought or ought not to be disputed. Here is an action on such a claim, to which the executor pleads *non assumpsit testator*, and that only; thereby admitting that he has assets, provided the claim be established. Pending this suit, other actions are brought against the executor, as for debts due from the testator, to which the executor makes no defence. Was he to blame in not making any defence? That question depends on the circumstances of the several cases; it must be in an executor's discretion, whether a claim be disputable or not, and we must presume that the defendant's reason for not resisting these claims was, that he thought them just; and if so, he was not only justified, but right in making no resistance. Judgment being recovered in these actions in *Michaelmas* term, the executor's situation appears materially altered at the next continuance of the present action. Before, he had no answer to the action; there had now been an incumbrance cast on the assets, which at the time of the last continuance were unincumbered. That being so, it would be great injustice if he were not to have an opportunity of pleading it; for if not, it would be impossible to prevent his being

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doubly charged. On principles of justice, therefore, the plea should be received. No objections of any weight have been made to its being received; not from any want of industry or talent, but because there is no similar case to be found in the entries or books; and it is a most extraordinary thing that no case should have been found, where such a plea has been admitted or rejected. But if we are of opinion, on the reason of the thing, that the plea should be admitted, we shall not reject it, merely because there is no authority to support it. The court is not bound by established forms: It is very much governed by them, but if we find facts sufficient to support our opinion, it is not necessary that it should be also supported by authorities. In *Waters v. Ogden* (a), this objection was made; it is not, therefore, a new objection. It is observable that, in that case, it was admitted by Mr. *Bower*, on the part of the plaintiff, that where there are two debts of the same degree, and an action is brought for one of them, the executor may give a preference to the other, by imparlances, and pleading dilatory pleas to the first action, and, in the mean time, confessing judgment for the second demand. Following the reasoning of the court in that case, and being of opinion that the facts furnish the defendant with a legal defence, we are of opinion that this plea may be put upon the record. It has been objected that the defendant might have applied for time to plead, till the first action was decided, and that then he would have had no difficulty in pleading to the second action: Without enquiring whether he could have applied for time, it is sufficient for our decision, that it would have been discretionary in the court, and an indulgence to the defendant, to have granted it. We think, therefore, that there should be

Judgment for the defendant.

(a) *Doug.* 452.

The KING v. The SHERIFF of KENT, in a cause of
 READ v. HAYWARD.

Wednesday,
 June 29.

Mr. Serjt. *Best*, on a former day in this term, obtained a rule *nisi* to set aside an attachment which had issued against the sheriff of *Kent*, for not returning a writ of *capias ad respondendum*, which had issued in this cause on 23d *April*, 1814. The affidavit of the sheriff's clerk stated that the sheriff was ruled to return the writ on the 14th of *June*, but that after diligent search he was unable to find the same, and that before the expiration of the rule, he gave notice to the plaintiff's attorney of this circumstance, and that the defendant was in his custody by virtue of process issued out of the *King's Bench*; notwithstanding which, the plaintiff had moved for and obtained an attachment against the sheriff.

Where the sheriff, on being ruled to return a writ, gave notice to the plaintiff that the writ was lost, and that the defendant was in custody; the plaintiff should have proceeded as if the sheriff had returned *cepi corpus*; and the court set aside an attachment issued against the sheriff for not returning the writ.

Mr. Serjt. *Vaughan* now shewed cause against the rule, and contended that the plaintiff had only followed the regular course in moving for the attachment, and that he would have been guilty of neglect if he had not so proceeded; for he could not have ruled the sheriff to bring in the body, till either the writ was returned, or till he had obtained a certificate from the *custos brevium* that the writ was not returned.

Mr. Serjt. *Best*, *contra*, said the question was, whether the sheriff had done all that lay in his power. He had given notice that the writ was lost, and that the defendant was in custody, and had thereby waived the necessity of the plaintiff's obtaining a certificate from the *custos brevium*; the plaintiff, therefore, should have ruled the sheriff to bring in the body. No injustice would accrue from this attachment being set aside, because the plaintiff

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could still go on against the defendant, who was in custody.

Lord Chief Justice GIBBS.—The question is, not whether the plaintiff might or might not have ruled the sheriff to bring in the body, without the writ having been actually returned, but whether, under all the circumstances, there were any ground for this attachment. Without, therefore, deciding the first question, I think this attachment should be set aside. The sheriff had actually executed the writ, and was desirous of returning it, but was prevented from so doing by its having been lost. He gave notice to the plaintiff of that circumstance, and also that the defendant was in custody. The plaintiff might then have proceeded as if the sheriff had returned *cepi corpus*, and had actually brought in the body.

Per Curiam,

Rule absolute.

END OF TRINITY TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

IN

MICHAELMAS TERM,

IN THE

FIFTY-FIFTH YEAR OF THE REIGN OF GEORGE III.

Memorandum.

In this term, *John Bernard Bosanquet*, of *Lincoln's-Inn*, Esq. was called to the degree of serjeant at law, and gave rings with this motto,

"Antiquam exquirite matrem."

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JORDAN v. BELL.

Monday, Nov. 7.

The court will not grant a *distringas* to compel an appearance, on the ground that the defendant is out of the kingdom.

Mr. Serjt. *Pell* moved for leave to issue a *distringas* to compel the appearance of the defendant in this cause, on an affidavit which stated that he was out of the kingdom, and therefore could not be served with process. The ground on which he rested his application was, that unless the court permitted the plaintiff to adopt this method of compelling an appearance, as if the defendant were actually in the kingdom, the plaintiff would be compelled to proceed to outlawry, and would thereby necessarily incur great additional expence.

Lord Chief Justice GIBBS.—So where a party proceeds by *latitat*, or *quo minus*, the proceedings are attended with expence. This is not a case within the act.—*Per Curiam*, Rule refused (a).

(a) *Vid. antè* 267.

Tuesday, Nov. 8.

CHARLES GREENWOOD and HUGH HAMMERSLEY, executors of THOMAS HAMMERSLEY, v. JOHN, lord bishop of LONDON and GEORGE PAWSON, clerk.

A. the incumbent of a living and owner of the advowson, agrees with B. for the sale of the advowson, and for the immediate resignation of the living; and accordingly tenders his resignation to the bishop, who refuses to accept it.—Another agreement is then entered into between the same parties, for the sale of the advowson only, without any contract for the resignation, and at the same time, by a separate agreement, A. grants a lease of the tithes and profits to B. for 99 years, if A. should so long live; under which lease B. receives the profits till A.'s death.—On A.'s death, the crown presents for that turn only by reason of simony.—The incumbent presented by the crown dies, whereupon B. claims the right to present.—It is objected by A.'s heir, that the second contract for the sale of the advowson, and the lease of the tithes of the same date, being for the purpose of carrying the former simoniacal contract into effect, was also simoniacal and void.—*Held*, that, whether the second agreement were simoniacal or not, the illegality, if any, extended to the next presentation only; and that, therefore, the crown having presented for one turn, B. had a good title to the advowson, and had a right to present on the present vacancy.

THIS was a *quare impedit*, and the declaration stated, That one *Robert Greenway*, in his life-time, was seized as of fee and right of the advowson of the church of *Bradwell juxta*

mare, in the county of *Essex*, as in gross by itself, and on the 11th of *May* 1771 presented *George Pawson*, clerk, now deceased, who was inducted thereto:—That the said *R. Greenway* continuing so seized of the said advowson, the said church became vacant by the cession of the said *G. Pawson*, whereupon the said *G. Pawson*, not having the right of presenting to the same, but by usurping upon the said *R. Greenway*, presented one *Henry Herring*, who was inducted to the same:—That afterwards the said church again became vacant by the death of the said *H. Herring*, whereupon the said *G. Pawson*, since deceased, not having the right of presenting to the same, but by again usurping upon the said *R. Greenway*, offered himself to the then Bishop of *London*, and was inducted:—That the said church being so full of the said *G. Pawson*, and the said *R. Greenway* being so seized of the said advowson, the said *R. Greenway* died on the 1st of *January* 1780; at whose death the advowson descended to one *John Greenway*, as brother and heir of *R. Greenway*:—That the said *J. Greenway* died on the day and year last aforesaid, seized of the said advowson, whereupon the said advowson descended to *Martha Greenway*, as sister and heir of *J. Greenway*:—That she, being so seized thereof, on the 24th of *January* 1784, by deed granted the said advowson to one *Albany Wallis*, his heirs and assigns for ever:—That the said *Albany Wallis*, being seized of the said advowson by virtue of that grant, on the 14th of *January* 1792, by deed granted the said advowson to one *Henry Bate Dudley*, now Sir *Henry Bate Dudley*, Baronet, his heirs and assigns for ever:—That the said *H. B. Dudley*, being seized of the said advowson by virtue of the said last mentioned grant, on the 18th of *January* 1794, by deed granted it to one *Thomas Skinner*, the said *Thomas Hammersley*, and one *Donald Cameron*,

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their heirs and assigns for ever :—That they being seized thereof by virtue of the said last mentioned grant, the said *D. Cameron* on the 1st of *February* 1794 died ; whereupon the said *T. Skinner* and *T. Hammersley* became seized of the said advowson in gross :—That they being so seized thereof, the said church, on the 31st of *December* 1797, became void by the death of the said *G. Pawson*, whereupon the king, claiming title in the said church for that turn only, by reason of simony, presented to the said church, as being vacant, one *John Gamble* as his clerk, who was thereupon inducted thereto :—That the said church being so full of the said *John Gamble*, and the said *T. Skinner* and *T. Hammersley* being so seized of the said advowson, the said *T. Skinner*, on the 1st of *January* 1803, died ; whereby the said *T. Hammersley* became, and from thence until and at the time of his death was, solely seized of the said advowson :—That he being so seized thereof, the said church, afterwards and in his life-time, viz. on the 27th of *July* 1811, became void by the death of the said *J. Gamble* ; whereupon it belonged to the said *T. Hammersley* to nominate a fit person to the said church, but that the defendants unjustly hindered the said *T. Hammersley* from the same :—That the said *T. Hammersley* in his life-time, viz. on the 1st of *August* 1812, by his last will and testament, appointed the plaintiffs his executors, and afterwards, and after the death of the said *J. Gamble*, and while the said church was vacant, viz. on the 25th of *October* 1812, died so seized of the said advowson :—That upon his death the plaintiffs proved his will, whereupon it belonged, and still belongs to them, as executors, to nominate a fit person to the said church, but that the defendants unjustly hindered them from the same, to the damage of the plaintiffs, as executors, of £1000.

The bishop, by his plea, alleged that he neither had, nor claimed to have, any thing in the said church or advowson, except the admission, institution, and induction of parsons to the said church, and other the matters which belonged to him as ordinary of the said church.

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The defendant *G. Pawson* pleaded two pleas; *first*,—That one *Thomas Skinner* and the said *Thomas Hammersley*, on the avoidance of the said church by the death of the said *G. Pawson* the elder, viz. on the 2d of *January* 1798, presented one *H. B. Dudley* to be inducted to the same:—That the said *R. Greenway*, in his life-time, was seized of the advowson in trust only for the said *G. Pawson*, deceased, his heirs and assigns; and that the said *John Greenway* and *Martha Greenway*, during their respective lives, till the grant of the said advowson by the said *Martha* in the declaration mentioned, were also seized of the said advowson in trust only for the said *G. Pawson*, deceased, his heirs and assigns:—That the said *G. Pawson*, deceased, being so interested therein, and being, at the several times hereinafter mentioned, parson imparsonnee of the said church, on the 22d of *February* 1781, it was by an agreement in writing, made between the said *G. Pawson*, deceased, of the one part, and the said *H. B. Dudley* of the other part, corruptly, simoniacally, and unlawfully, and against the form of the statute in such case made and provided, agreed, “That the said *G. Pawson*, deceased, “in consideration of the sum of £8750 to be paid as “therein mentioned, should sell and make a good title, “and convey and assure to the said *H. B. Dudley* and his “heirs, or to whom he or they should direct, within one “month, the said advowson, with the glebe and other “lands, tithes, profits, privileges, benefits, rights of patronage and presentation, with their appurtenances, “which then were of the yearly value of £700. 14s. 6d.: “That the said *G. Pawson*, deceased, should immediately,

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“ by resignation or otherwise, vacate the said rectory,
 “ and present the said *H. B. Dudley* thereto, and pay all
 “ expences thereof, and should allow to the said *H. B.*
 “ *Dudley* such sums as should be secured for dilapidations;
 “ and that the said *H. B. Dudley* should be entitled to
 “ the produce of the said rectory from the 29th of *Sep-*
 “ *tember* then last:”—That in pursuance and in further-
 “ ance of the said corrupt agreement, the said *G. Pawson*,
 “ deceased, on the 1st of *March* 1781, unlawfully offered
 “ his resignation of the said rectory to *Robert*, then Bishop
 “ of *London*, which resignation the said bishop refused to
 “ accept; whereupon, to attain the end of the said corrupt
 “ agreement, on the 6th of *April* 1781, by another agree-
 “ ment in writing, reciting, “ That the said *H. B. Dudley*
 “ had agreed with the said *G. Pawson*, deceased, for the
 “ purchase of the perpetual advowson of the rectory of
 “ *Bradwell*, for the sum of £8000, and had accordingly
 “ paid the sum of £2500 in part thereof;—the said
 “ *H. B. Dudley* did thereby agree to pay the residue of
 “ the said sum of £8000 at the end of two years, and the
 “ said *G. Pawson*, deceased, in consideration thereof, did
 “ promise and agree with the said *H. B. Dudley*, to sell
 “ and make out a good title to, and well and effectually
 “ convey and assure to the said *H. B. Dudley* and his
 “ heirs, or to whom he or they should direct, within the
 “ space of one month, the said advowson, with the glebe
 “ and other lands, tithes, profits, privileges, and benefits,
 “ rights of patronage and presentation, with their appur-
 “ tenances, which then were of the yearly value of £700.
 “ 14s. 6d.; and would allow to the said *H. B. Dudley* the
 “ sum of £60 for dilapidations; the said *H. B. Dudley* to
 “ be entitled to the profits of the said rectory from the
 “ 29th of *September* then last:”—That on the 10th of *April*
 “ 1781, in consideration of the several premises above
 “ stated, by a certain other agreement in writing, it was

further agreed, "That the said *G. Pawson*, deceased, "should demise and let to the said *H. B. Dudley* all the "tithes, great and small, with the glebe lands and other "lands and profits to the said rectory belonging, to hold "from *Michaelmas* then last for the term of 99 years, if "he the said *G. Pawson* should so long live, at the "yearly rent of a pepper corn; and the said *G. Pawson*, "deceased, did thereby engage to execute a lease with "proper covenants and authorities to the said *H. B. Dudley*, or to whom he should appoint, for the recovery of "the tithes and profits." By virtue of all which premises, the said *H. B. Dudley*, on the said 10th of *April* 1781, entered into possession of the tithes, with the glebe and other lands to the said rectory belonging, and received the profits thereof from thence, until the death of the said *G. Pawson*:—That the said grant in the said declaration mentioned to be made by the said *Martha Greenway* to the said *Albany Wallis*, his heirs and assigns, was made in trust only for the said *H. B. Dudley*, his heirs and assigns, and was so made with the privity of the said *H. B. Dudley*, in furtherance of the said corrupt agreements, and to confirm and establish the same, and to attain the end thereof as much as might be; whereby, and by force of the statute in that case made and provided, the same was and is void in law, and nothing passed thereby:—That the said *G. Pawson* died, as in the declaration mentioned, leaving the said *G. Pawson*, the defendant, his eldest son and heir at law; whereupon the interest of the said *G. Pawson*, deceased, in the said advowson, descended and came to the said *G. Pawson*, the defendant.

The second plea omitted to state the agreement of the 22d of *February* 1781, and the tender of resignation by *G. Pawson* the elder;—in every other respect it was similar to the first plea.

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The plaintiffs replied to the bishop's disclaimer, by praying judgment and a writ to the bishop. To the defendant *Pawson's* pleas they demurred generally, and he joined in demurrer. This case was argued first in *Easter* term last, by Mr. Serjt. *Best* for the plaintiffs, and Mr. Serjt. *Lens* for the defendant *G. Pawson*; and again in *Trinity* term, by the *Solicitor General* for the plaintiffs, and Mr. Serjt. *Vaughan* for the defendant.

It was premised by the counsel on the part of the plaintiffs, that the facts for the consideration of the court, as they appeared on the face of the pleadings, were, that an agreement had been entered into between Sir *H. B. Dudley* and *G. Pawson* the elder, who was then incumbent and owner of the advowson, for the sale and resignation of it; that on *Pawson's* resignation, the Bishop of *London* refused to admit *Dudley*, on the ground that the contract was simoniacal; that in consequence of that refusal, and in order to carry the former agreement as far as possible into effect, another agreement was entered into between the same parties for the sale of the advowson, but without any contract for the resignation; that on the death of *G. Pawson* the elder, the crown had presented for the first turn, by reason of the alleged simony, after which, *Dudley* claimed as legal owner of the advowson. The question upon these facts was, whether the plaintiffs were entitled to present to the vacant living, or whether, in consequence of the simoniacal contract of the 22d of *February* 1781, *Dudley* had forfeited the advowson, and also the second deed of the 6th of *April* 1781 were absolutely void; in which case, the advowson would pass to the defendant *Pawson*, as son and heir to the person who made that contract.—It was impossible, they said, not to feel the injustice of the defendant *Pawson* attempting to get possession of the living, by taking advantage of the supposed illegality to which his father had

been a party. But as the law would not yield to feelings of that kind, it would be necessary for them to shew that, neither by the common law nor by statute, could these pleas be supported; and that Sir *H. B. Dudley* had received all the punishment which the law could inflict upon him, viz. the loss of one presentation. There was nothing, they said, in the statutes, which would make the deed absolutely void: So far from it, the stat. 31 *Eliz. c. 6 (a)*, and 12 *Ann. st. 2. c. 12 (b)*, both declared what

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(a) The fourth section, which chiefly relates to other matter, concludes thus: "And for the avoiding of simony, and corruption, in presentations, collations, and donations, of and to benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions, institutions, and inductions to the same."

The fifth section enacts, "That if any person or persons, bodies politic and corporate, shall at any time, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurances of or for any sum of money, reward, &c. present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same, for or in respect of any such corrupt cause or consideration; that then every such presentation, collation, gift, and bestowing, and every admission, institution, investiture, and induction thereupon, shall be utterly void, frustrate, and of none effect in law; and that it shall be lawful for the queen's majesty, her heirs and successors, to present, collate unto, or give or bestow, every such benefice, &c. for that one time or term only;—and that every person that shall give or take any such reward or promise thereof, shall forfeit double the value of one year's profit of such benefice, &c.;—and any person so corruptly taking, procuring, seeking, or accepting any such benefice, &c. shall be disabled to have or enjoy the same."

(b) The second section of that statute enacts, "That if any person shall for any sum of money, reward, &c. or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance thereof, directly or indirectly, in his own name, or that of any other person, take, procure, or accept the next avoidance of, or presentation to, any benefice, &c., and shall be presented or collated thereupon, every such presentation or collation, and every admission to the same, shall be void; and such agreement shall be deemed a simoniacal contract; and that it shall be lawful for the queen's majesty, her heirs and successors, to present or collate unto, or give or bestow, every such benefice, &c. for that one time or term only;—and the person so corruptly taking, procuring, or accepting any such benefice, &c., shall from thenceforth be disabled to enjoy the same, and shall

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the consequences of simony specifically should be, viz. that the crown should present "*for that turn only*;" and the legislature had made use of that express term to shew that the next presentation only should be forfeited. But notwithstanding that restriction in the statutes, it would perhaps be contended, that this agreement was void at common law. There were, however, strong authorities, for saying that simony was no offence at common law. [Mr. J. Heath. Neither is adultery an offence at common law; but it is *contra bonos mores*, and on that account would vitiate any contract of which it formed a part.] There were other authorities, they admitted, of great weight the other way; and these contradictions were reconciled by Lord Chief Justice *De Grey* in *Barrett v. Glubb (a)*, where he said that simony, as such, was not known to the common law; though corrupt presentation was. [Lord C. J. Gibbs.—By that he meant that what is now called simony was known to the common law, though not by that name.] Still, that only meant the contract for the next presentation; but such a contract, they contended, did not avoid all the other parts of the deed.—This species of property might as well be the subject of bargain and sale, except as far as regarded the next presentation, as any other commodity. If any one were to buy an estate or manor to which there should be an advowson appendant, and should contract for the resignation of the living, such latter contract would be void, because it would be contrary to the policy of the church establishment, but it would not vitiate the sale of the estate.—In the case of the Bishop of *Lincoln v. Wulforstan (b)*,

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"be subject to any punishment, prescribed by the laws ecclesiastical, as if such corrupt agreement had been made after such benefice, &c. had become vacant."

(a) 2 Bl. 1052.

(b) 3 Bur. 1504.

the reporter stated the court to have been clear that a grant of a next presentation, or of an advowson, made after the church had actually fallen vacant, was a void grant. But in *Barret v. Clubb*, as reported in *Blackstone*, Lord C. J. *De Grey* confined the forfeiture to the present vacancy, and observed that it was an inaccuracy in the reporter of the Bishop of *Lincoln's* case, to say that the grant of the advowson was absolutely void.—

[Lord Chief Justice *Gibbs*.—No doubt but the grant of the advowson was valid, though the living were vacant, and the question in that case was only whether the vacant turn passed; and I take it that by the sale of an advowson, while the church is vacant, the next presentation does not pass; for if the owner of an advowson die while the church is vacant, the next presentation goes to the executor, and not to the heir. The present question is, whether there be confessedly a mixture of legal with illegal contracts in this transaction, which cannot be separated.—The case of *Barrett v. Glubb* is also reported in *Gwillim's* edition of *Bacon's* abridgment, tit. simony, p. 185, and Lord Chief Justice *De Grey* there makes use of expressions, which very much countenance what will be contended for by the other side: viz. that the simoniacal part of this contract vitiates the whole.]—

The report of the case in *Blackstone*, they contended, was more likely to be correct, because he was one of the judges who decided it, and he was also counsel in the case of the Bishop of *Lincoln v. Wolsforstan*. According to *Blackstone*, then, the judgment of Lord Chief Justice *De Grey* was exactly in favour of the plaintiffs; for in that judgment it was laid down, that what should or should not be simony depended on the 31st of *Elizabeth*, c. 6, which had defined it to be “a corrupt agreement to present;” and that no conveyance of an advowson could be affected by that act except as to the immediate

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presentation. This was no anomaly in the law of *England*, for according to general principles, all deeds which were partly illegal, were void only *quoad* that part. There was a distinction in this respect between a deed void at common law and by statute. In *Viner's Abridgment*, tit. *Faiths* (E. 2.), it was said that a bond void in part "by statute law" was void *in toto*, but that "at common law," it was good as to the legal part, and void as to the illegal; for which position *Norton v. Simmes* (a) was cited. They admitted that, if one part of the deed would not stand without the other, the whole would be void; but there was no such difficulty in the present case. If this had been an action for the purchase money, the answer would have been, that the consideration being partly void, no part of it could be recovered; because the court could not distinguish the good from the bad. But in the present case, that distinction might be made; the court might enforce that which was good; that which was illegal had been already lost. *Dudley* was to give a sum of money for the advowson, in consideration of which, the owner agreed to do that which was lawful, and also something which was illegal, and which, therefore, *Dudley*, could not enforce; but there was no illegal consideration moving from *Dudley* in respect of the advowson. Suppose a party, on the same instrument, had granted the advowson, and had also covenanted to resign immediately, even there, they contended, the grant would have been good, though the other part of the instrument would have been void. In *Pigot's case* (b), it was unanimously agreed that, if some of the covenants of an indenture, or of the conditions of a bond, be against law, and some good and lawful, the covenants or conditions which are against law are void *ab initio*, and the others stand good. [Lord Chief Justice Gibbs.—You admit that the legal

(a) *Hob. 14. Moore, 856. S. C.*

(b) *11 Coke, 27. b.*

part is so complicated with the illegal, that if the question were for the recovery of the consideration money, you would not be entitled : Suppose the conveyance had been executed and delivered to the purchaser, but the consideration money had not been paid ; and the first presentation being forfeited, the crown had presented : you contend that the purchaser would have had a right to all the subsequent presentations. In that case, what would have become of the purchase money, for the consideration would have been good for part and bad for the whole?] That, however, was not the present question ; the question was, whether, if a man sold two things, one of which he had a right to sell, and the other not, the illegality of the one would prevent him from selling the other. They had been arguing this question, they said, as if there had been but one deed, for the second agreement was that on which the case must stand or fall. It never could be contended that, because the first contract, which had not been carried into effect, was illegal, the second agreement, unless that were also illegal, could be affected by the former, which had been abandoned. If two parties entered into an agreement which would be usurious, what would prevent them from relinquishing it, and entering into another, for the purpose of carrying the former agreement, as far as possible, into effect ; provided the second agreement were not also usurious ? So in the present case, the parties, finding that their first agreement was illegal, had entered into a second contract, keeping clear of the former illegality, but coming as near the intent of the first contract as they could. With respect to the lease of the tithes, they contended that simony consisted in the purchase of the incumbency ; of the office of the church, not of its profits ; in giving a sum of money to be let in to perform the functions of the church, not to receive the produce of it ; and that,

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before the statute of *Elizabeth*, there was nothing to prevent a man from parting with his tithes for a sum of money, any more than he might have sold a rent reserved. But even supposing that lease to be bad, it was a separate agreement, and perfectly distinct from the contract for the sale of the advowson. No authority, they said, could be adduced against their argument, and the court would certainly not be inclined to carry the punishment for this illegality beyond what the law strictly required. It might be said that this was not to be considered in the light of a punishment by the crown, but that it was an objection by the heir-at-law to fulfil the illegal contract entered into by his father. But if his father could not have supported this plea, neither could his heir, who stood in his place. This was not like the case of a conveyance of lands, of which possession had not been given: *Dudley* had received the utmost possession of the living, that an incorporeal hereditament was capable of; indeed a *quare impedit* implied possession, and was a possessory action. They therefore concluded that the pleas were bad, and that the plaintiffs, consequently, were entitled to judgment.

On the part of the defendant *G. Pawson*, Mr. Serjt. *Lens* and Mr. Serjt. *Vaughan* observed, that as to the hardship of the case, it was but just that the person who attempted to defeat the law should himself be defeated, by losing his object, and the consideration money by which that object was to be attained. It was quite clear, they said, that simony was an offence at common law, so as to render void all acts done to give effect to it. For this they cited *Co. Lit.* 17. b. "*Si come de advowson.*" It is there laid down "that a man cannot say that he is seized thereof *in dominico suo de feodo*, whereby it appeareth how the common law doth detest simony, and all corrupt bargains for presentations, &c. And

"that is the reason that guardian in socage shall not present to an advowson, because he can take nothing for it, and by consequence, he cannot account for it." So *Cro. Car.* 353. 361, and *Hobart* 165, *et seq.* As to the objection, that the statute of *Elizabeth* did not expressly mention the word simony, that circumstance, they said, was perfectly explained in *Burn's Ecclesiastical Law* (a); and the mistake on that point had arisen from the preamble to the fifth section having been inserted in the wrong place; viz. at the end of the fourth section, instead of the beginning of the fifth. That statute, therefore, did recognize simony as an offence, and, in furtherance of the common law, had imposed a temporal punishment to prevent it. That punishment, they contended, did not consist merely in the forfeiture of the next presentation: That was the immediate consequence imposed by the statute, but it did not therefore follow that the whole contract was not void. The case cited from *Burrow*, supposing Mr. J. *Blackstone's* animadversion on the report to be correct, was not applicable to the present. All that it was necessary to attend to in that case was, that the church being void, the next presentation did not pass by the sale of the advowson. But when an agreement

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(a) 3d vol. tit. *simony*, p. 351.—"Almost all the authors who have treated of this subject, and even the learned judges, in delivering their resolutions in cases of simony, have asserted that there is no word of simony in this act, and from thence a conclusion had been drawn in favour of the ecclesiastical jurisdiction, that the temporal courts have nothing to do with simony, as such, or to define what shall be deemed simony and what not, but only to take cognizance of the particular corrupt contracts therein specified. Which consequence, although deducible perhaps from other premises, yet doth not follow from the aforesaid observation; for it is plain, here is the word simony, and the mistake seemeth to have happened from this short preamble being inadvertently printed at the end of the foregoing section, treating intirely of a different subject, so as to have been overlooked by the first person who made the observation, whom others have followed with." *Id.*



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for a purchase involved an illegal consideration, or if it had for its object to mix up the legal with the illegal part of it, it must always be bad, whether there were a vacancy or a plenarty of the church. In the present case, if there had been simply a sale of the advowson, without an express stipulation for the next presentation, the contract would have been good: But there was that express stipulation, and in *Walker v. Hammersley* (a), it was decided that the sale of an advowson, with a covenant to present, was a simoniacal contract. The two parts of the agreement being thus blended and incorporated with each other, the whole contract was tainted with the illegality. In *Pigor's* case, which had been cited as in favour of the plaintiffs, a distinction was taken, among others, between a deed of which the several clauses were absolute and distinct, and where the clauses, though several, had a dependency on each other. The case of *Barrett v. Glubb*, as reported in *Gwillim's* edition of *Bacon*, had set this subject in its true light. Lord C. J. *De Grey* there said, that a *bonâ fide* purchase of an advowson was good, at what time soever it was made, and that a corrupt purchase, whensoever made, was bad. It had been contended that the court might separate the legal from the illegal part of the agreement, and that there was no illegal consideration moving from *Dudley* to *Pawson*: But one intire consideration had been given for the whole; how then was it possible to say how much had been given for the advowson, and how much was applicable to the next presentation? In *Fetherstone v. Hutchinson* (b), which was an action of *assumpsit* on a special agreement, the court held that the consideration, which consisted of two parts, the one legal and the other illegal, was void for the

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(a) 3 *Lev.* 115, and *Skinner*, 90. *S. C.* (b) *Cro. Elis.* 199.

whole. The case of *Norton v. Simmes* was in favour of the defendants, since, as they contended, the present contract was made void by the operation of the statutes. This had been compared to the case of usury, but they contended that in that case, if the second agreement were used as a shift to carry into effect the former usurious contract, the law would never allow a person to recover even his legal interest, but the whole agreement would be void. It was not, therefore, sufficient to shew that the second agreement was in itself valid, without also shewing that the first was legal; since the lease of the tithes was only a subterfuge to introduce, in substance, the identical thing that was intended to be done by the first agreement, though differently in point of form. The lessee of the tithes would be as completely in the receipt of the profits, as if he had been actually presented to the living, and this was in fact admitted by the demurrer. It had been conceded that an action could not have been supported for the consideration money; neither, for the same reason, could this agreement be upheld.

The *Solicitor General* and Mr. Serjt. *Best*, in reply, recapitulated the grounds of their former argument. With respect to the case of *Walker v. Hammersley*, they contended that it was quite inapplicable, for in that case, the church being considered as void while filled by usurpation, the contract was, in reality, for the next presentation.

The court took time for deliberation on this case, till the present term, and on this day, judgment was delivered by

Lord Chief Justice GIBBS.—This is a *quare impedit*, brought by the plaintiffs against the bishop of *London* and *George Pawson*, clerk, for disturbing them in their right of presentation to the church of *Bradwell juxta mare*, in the county of *Essex*; and the question before

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us arises upon a demurrer to the pleas of the defendant *Pawson*:—The case has been twice very ably argued, and it will be sufficient for me to state generally the substance of the pleadings, as they give rise to the point upon which our judgment will turn:—The plaintiffs claim the presentation in question, as executors of *Thomas Hammersley*, who died after the present vacancy had taken place:—They deduce the legal title to the advowson from one *Robert Greenway*, who in 1771 presented *George Pawson*, deceased, to the church:—They state that upon the vacancy by the cession of *George Pawson*, he the said *George Pawson* presented *Henry Herring* by usurpation upon the said *Robert Greenway*, and that upon another vacancy by the death of *Herring*, *Pawson* presented himself by a like usurpation, and that whilst the said *Pawson* was incumbent, the advowson descended from *Robert Greenway* to his brother *John Greenway*, and afterwards from *John* to his sister *Martha Greenway*:—That in 1784, *Martha Greenway* conveyed it to *Albany Wallis* and his heirs; in 1792, *Wallis* conveyed it to Sir *H. B. Dudley* and his heirs, and in 1794, Sir *H. B. Dudley* conveyed it to *Skinner*, *Hammersley*, and *Cameron*, and their heirs:—That in the same lastmentioned year *Cameron* died:—That in 1797, the church became vacant by the death of *Pawson*, the then incumbent, whereupon the crown, claiming title to it for that turn only, by reason of simony, presented *John Gamble*:—That *Skinner* afterwards died, whereupon *Hammersley* became sole seized of the advowson in fee:—That in *Hammersley*'s lifetime, the church again became vacant by the death of the said *John Gamble*:—That during this vacancy *Hammersley* died, leaving the plaintiffs executors of his will, to whom the right of presenting for the present turn belonged, and that the defendants disturbed them in it.—The defendant *Pawson* impeaches the conveyance from *Martha Greenway* to

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Wallis, as simoniacal, and therefore void:—He alleges that the said *Robert, John, and Martha Greenway* were respectively seized of the said advowson, as trustees only for the said *George Pawson* deceased:—That in 1781 the said *George Pawson* deceased, being seized of the equitable estate of the advowson in fee, and being also incumbent of the church, entered into a contract with *Sir H. B. Dudley* for the sale of the advowson to him in fee, which contract was in some of its stipulations simoniacal, and therefore illegal and void:—That in pursuance of the said simoniacal contract, the said conveyance from *Martha Greenway* to *Wallis* in 1784 was made by the direction of the said *G. Pawson*, in trust for the said *Sir H. B. Dudley*, and was for the same reason illegal and wholly void.—The plaintiffs deny that this contract was simoniacal, and they insist further that, even if it were so, the objection goes only to the next presentation; that the forfeit has been paid by the presentation of *Gamble* by the crown, on the first avoidance which fell, and that the conveyance stands good for the residue.—I shall take this last question first, assuming that the contract was simoniacal, and that the conveyance to *Wallis* was made in furtherance of it; because, if this be determined in favour of the plaintiffs, it will be unnecessary to consider the other:—Upon this part of the case, it should be observed that we are not called upon to decide, whether the contract itself could be in any degree enforced, which would be a very different question; but whether a conveyance made in execution of it can be supported to any, and what extent.—The statutes against simony apply only to the presentation corruptly procured, or intended to be procured, and the offence of simony at the common law, (admitting it to have been an offence) can be carried no farther.—The presentation thus corruptly procured or trafficked for is forfeited to the crown, and certain penalties and disabilities are inflicted on the offenders.

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The statutes contain no express provision for avoiding simoniacal conveyances, but there can be no doubt that the conveyance even of an advowson in fee, which in itself is legal, if it be made for the purpose of carrying a simoniacal contract into execution, is void as to so much as goes to effect that purpose; and, if the sound part cannot be separated from the corrupt, is void altogether. It is not, as in the case of usury and some others, avoided by the positive and inflexible enactment of the statute, but left to the operation of the common law, which will reject the illegal part, and leave the rest untouched, if they can fairly be separated. The question, therefore, is whether such separation can be made in the present case:—The conveyance to *Wallis*, upon which this question arises, purports to carry the whole advowson, including the next presentation. The contract, in furtherance of which this conveyance was made, is assumed to be simoniacal; but this charge of simony can be applied to the next presentation only. A vacancy has taken place, and the crown has thereupon presented under the statute; because the conveyance to *Wallis* was, on the same assumption, considered to be so far void; but here the simoniacal part of the transaction ended. Up to this point, the conveyance made in furtherance of the simoniacal stipulation has been treated as ineffectual; but the remaining interest which passes by it stands clear of this objection, and may, as we think, be fairly separated from the objectionable part:—It is true that, by the contract, one entire consideration is to be paid for the whole advowson, and we cannot say how much should be referred to the legal, and how much to the illegal part of the transaction; but we are sure that our decision supports so much only of the conveyance, as applies to the legal part. The rest has been dealt with as illegal, and the crown has taken the forfeiture. No decided case has been cited which bears directly upon the point in ques-

tion; but certain expressions of Lord Chief Justice *De Grey*, in the case of *Barrett v. Glubb*, as it is reported in the latter editions of *Bacon's* abridgment, tit. *Simony*, A. have been selected and relied upon, as shewing that where simony enters into any part of the contract, the whole conveyance made in pursuance of it is void:— There certainly are passages in that report which, taken by themselves, seem to countenance this opinion; but it is to be observed that the question then before the court was confined to the next presentation only; that no such doctrine is to be found in the report of the same case by Mr. Justice *Blackstone*, who joined in the judgment, and therefore it is very probable that the expressions relied upon are inaccurately reported, or may perhaps have been used with reference only to the next presentation, upon which alone the court had to decide. Be this as it may, we certainly cannot be guided by so loose an authority, when the reasoning of the case leads us to a different conclusion. Our opinion being in favour of the plaintiffs upon this point, the question, whether the contract were or were not simoniacal, becomes immaterial on the present record, and therefore there must be

Judgment for the plaintiffs.

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WAUGH and others, administrators of PHILLIPS, v.

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THIS action was brought by the administrators of *E. Phillips*, on a bond which had been given by the defendant to the intestate, conditioned "for the payment to the
" intestate of one hundred pounds, by six equal payments,
" viz. the sum of £16. 13s. 4d. each year, until the full

In a bond conditioned "for
" the payment
" of one hundred pounds
" by instalments,
" till the full
" sum of one

" pounds be paid;" the word *hundred* having been omitted in the second place where it occurred in the condition:—*Held*, that the insertion of it by a stranger was an immaterial alteration, and did not avoid the instrument.

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"sum of *one pounds* should be paid." The word *hundred* had been omitted after the latter word *one* in the condition, and had been interlined by a stranger to the instrument, after the execution of it, without the privity of the defendant. The plaintiffs had been nonsuited in a former action on this bond, on the ground that, having set out the condition in the oyer with the word "*hundred*," there was a variance between the condition and the oyer; and the court, after hearing the question argued, refused to set that nonsuit aside (a). In the present action, the plaintiffs set out the condition conformably to that decision, and the cause was tried before Mr. Justice *Dallas*, at the last assizes for the county of *Gloucester*, when a verdict was found for the plaintiffs.

Mr. Serjt. *Best* now moved that this verdict should be set aside and a nonsuit entered, on the ground that the instrument was made altogether void by the alteration, and that, therefore, the plaintiffs could in no shape recover upon it. He cited *Pigot's case* (b), where it was resolved that when any deed is altered in a material point by the plaintiff himself, or by any stranger, the deed becomes void:—He also cited *Markham v. Gonaston* (c), to the same point. In the present case, he said, the bond, as originally made, was absurd; and it was for the purpose of giving it effect, of making perfect that which was before imperfect, that the alteration had been made. The insertion, therefore, had altered the nature of the defeazance, and could not, consequently, be considered as immaterial. It might be said to be hard that a bond should thus be rendered ineffectual by the act of a stranger; but it was the duty of the obligee not to let the bond get into the hands of another person.

(a) *Vid. ante*, p. 214.—(b) 11 *Coke*, 26. (b).—(c) *Cro. El.* 626.

Lord Chief Justice GIBBS.—I think that this passage would have been intelligible from the context, though the alteration had never been made, and that the alteration was perfectly immaterial. If the sense remain the same after the alteration that it was before, the alteration is immaterial: now it is clear that, leaving the sentence as it originally stood, the meaning was that the instalments should be paid till £100 were paid; for that sum is in the first place directed to be paid, and then the *mode* of payment is prescribed. The legal effect of the bond, therefore, being the same before the alteration as after it, I am of opinion that the alteration is immaterial, and having been made by a stranger, does not avoid the instrument.—*Per Curiam*,

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WAUGH
v.
BUSSELL.

Rule refused.

MILES v. ROSE and others.

Tuesday, Nov. 8.

THIS action was brought for obstructing the plaintiff's barges, on a certain public navigable river called *Rainham Creek*, in the parish of *Hornchurch*, in the county of *Essex*, and was tried before Mr. Justice *Le Blanc*, at the last assizes at *Chelmsford*. The defence set up was, that it was not a public navigable river, but was the property of the defendants. It appeared that it was an inlet of the river *Thames*, and that the tide flowed up it as far as the premises belonging to the defendants, which consisted of two wharfs situated at a place called *Redbridge*. The defendants rested their claim on these grounds; that the creek had been made navigable by their predecessors, and was kept in a navigable state by means of the defendants' cleansing it;—that in several deeds, by which

On a question whether a creek be a public navigable river or not, instances of persons going up it, for the purpose of cutting reeds, and on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are evidence sufficient for the jury to presume it a public river.

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the wharfs now in their possession had been conveyed to different occupiers, the premises went by the name of "*Raynham wharf and creek*;" that these wharfs were the only places where goods were accustomed to be landed from the creek; and that the plaintiff himself had been in the habit of paying wharfage to the defendants. On the part of the plaintiff, who did not claim as being possessed of any lands or tenements abutting on the creek, but on the ground that it was open to all the king's subjects as a navigable river, it was proved that there were instances, though few in number, of boats going up the creek without the permission of the defendants; some for the purpose of cutting reeds, others on parties of pleasure. On this evidence, the learned judge, without expressing any opinion on the one side or the other, left it to the jury to say whether this were a public navigable creek, or whether it must be considered as the private property of the defendants; observing, however, that, as the mention of the premises in the deeds was not a circumstance of much certainty, the chief question was the manner in which the creek had been used. The jury found a verdict for the plaintiff.

Mr. Serjt. *Best* now moved for a rule to shew cause why this verdict should not be set aside, and a nonsuit entered, or a new trial granted, on the ground that the weight of the evidence was in favour of the defendants. This case, he said, was to be tried by analogy to a public right of way. It had been proved that the custom was for the boats, which went up the creek, to load and unload at the defendants' wharf; they must therefore be considered as merely going to the premises of the defendants, and for their benefit, since they paid for the permission to land their goods. The few instances which had been adduced on the part of the plaintiff, could not be taken to outweigh the general usage.

Lord Chief Justice GIBBS.—Those instances, however few in number, are very important in their nature. The going up for the purpose of cutting reeds was a very strong act. So in every instance, of parties going up for pleasure, or for any other purpose, the defendants were always interested in supporting their own exclusive right, if they possessed any such right.

Mr. Serjt. *Best* then suggested that, if the present verdict were to be suffered to stand, the defendants would be bound by it, and would be precluded from asserting their right on any future occasion. The Chief Justice, however, observed that it had been decided many years ago in this court, that a party was not concluded by having a verdict against him, provided he could bring better evidence; but that, as the present case stood, the court saw no reason for sending it to another jury.—*Per Curiam*,

Rule refused.

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MILES
v.
ROSE.

HULTON v. EYRE.

Tuesday, Nov. 8.

Mr. Serjt. *Pell* moved for a rule to shew cause, why the defendant in this action should not be discharged out of the custody of the sheriff of *Nottingham*, on the ground that the affidavit to hold to bail was defective. The affidavit stated the defendant to be indebted to the plaintiff, “for money paid, laid out, and expended by the plaintiff, to and for the use of the defendant,” without adding the usual words, “and at his request.” The principle, he said, of these affidavits was, that the debt must always be sworn to with sufficient positiveness; from the affidavit in the present case, the defendant could only be supposed by inference to be indebted to the plaintiff. [Mr. Justice

In an affidavit to hold to bail, for money paid to the use of the defendant, it is not necessary to state that it was at the request of the defendant.

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 v.  
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*Chambre*.—The debt must certainly be sworn to *positively*; but it would be very inconvenient to require the same precision in an affidavit to hold to bail, as in a declaration.] Mr. Serjt. Pell then cited *Perkes v. Severn* (a), where the court of *King's Bench* held that it was not sufficient to state in the affidavit, that the defendant was indebted to the plaintiff for goods sold and delivered, without further alleging that they were sold *by the plaintiff to the defendant*; and *Cathrow v. Hagger* (b), and *Taylor v. Forbes* (c), in which that court held, that it was not enough to state that the goods were sold and delivered *to the defendant*, without saying *by the plaintiff*.—He admitted that these cases were not exactly in point; but he contended that they were sufficient to prove that the plaintiff must shew the legal obligation which the defendant was under to him.

Lord Chief Justice GIBBS.—The ground of the objection in the cases cited was, that it was not stated *to whom* the defendant was indebted:—The affidavit might have been perfectly true, and yet the debt might have been incurred with another person. In the present case your objection is that, if the plaintiff were to state his cause of action in his declaration, as he has done in his affidavit, the defendant might demur. Would not this statement have been sufficient in the case of goods sold and delivered? and yet there, it would be necessary *in the declaration* to state a request on the part of the defendant.—In an action for money had and received, it is stated to be received to the use of the plaintiff; and though that depends on the construction and legal result of the transaction, yet the plaintiff takes upon himself to swear that the money was received for his use: that is going much farther than in the present instance. Suppose the money

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(a) 7 *East*, 194.—(b) 8 *East*, 106.—(c) 11 *East*, 315.

had been paid by operation of law, to avoid a distress, for example, of the plaintiff's goods, for the arrears of the defendant's taxes; the defendant would very probably have even desired the plaintiff not to pay it. You would not, in such case, require a man with a tender conscience to swear that the money had been paid at the request of the defendant. I think that is a decisive argument against the present application.—*Per Curiam*,

Rule refused (a).

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v.  
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(a) In a cause of *Bliss v. Atkins*, in this court, in the present term, the affidavit was "for work and labour as the defendant's servant," without stating "at the request of the defendant;" and the court refused Mr. Serjt. Best's motion to set aside the proceedings, considering the allegation, "as the defendant's servant," to be sufficient.—See the next case.

So where the affidavit is for work and labour, as the defendant's servant.

SYMONS v. ANDREWS.

Thursday,  
Nov. 10.

THE defendant in this action had been arrested on the following affidavit:—"Philip Symons of Wapping, High-street, in the county of Middlesex, master mariner, maketh oath and saith that William Andrews is now justly and truly indebted unto him this deponent, in the sum of £68 and upwards, for money paid, laid out, and expended, and wages due to him, this deponent, for his services, as master and commander, on board of the ship *Little William*, whereof the said William Andrews is an owner;" concluding with the usual negative of tender.

Mr. Serjt. Lens now moved that the defendant should be discharged out of custody, on entering a common appearance, on the ground that the affidavit did not state the debt to be due from the defendant; and he

An affidavit to hold to bail, stating "that the defendant is indebted to the plaintiff for money paid, laid out, and expended, and wages due to the plaintiff for his services on board the defendant's ship," is sufficient, without expressly stating that the debt is due from the defendant.

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cited *Perkes v. Severn* (a), *Cathrow v. Hagger* (b), and *Taylor v. Forbes* (c), to shew that, in an action for goods sold and delivered, the affidavit must state that the goods were sold and delivered by the plaintiff to the defendant. In the present case, it might be very true that wages were due to the plaintiff, but it did not appear from whom they were due.

Lord Chief Justice GIBBS.—I see no objection to this affidavit. The allegation "*whereof the said William Andrews is an owner*" is very material; for as he is the owner, it is clear that the wages were due from him; whereas in the cases cited, there was nothing to shew by whom the goods had been delivered.

Mr. Serjt. *Lens* then withdrew his motion (d).

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(a) 7 *East.* 194.—(b) 8 *East.* 106.—(c) 11 *East.* 315.  
 (d) See the last case.

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Thursday,  
 Nov. 10.

LE FEUVRE v. LLOYD.

A. employs B. to sell goods for him; C. as B.'s broker, procures a purchaser, and draws a bill for the amount, payable to A. which is accepted by the purchaser, but dishonoured.—*Held*, that C. is answerable to A. as drawer of the bill.

THIS was an action against the administrator of *John Lloyd*, on a bill of exchange, which had been drawn by the intestate, under the following circumstances. The plaintiff, who was a merchant at *Southampton*, applied to Messrs. *Maitland* and Co. in *London* to dispose of some cotton for him, which the latter agreed to do, and accordingly employed the intestate, as their broker, to sell it. A purchaser being procured, Messrs. *Maitland* wrote to the plaintiff, informing him that "the party would

"take the cotton at 20*d. per lb.*, to be paid for by a bill "in two months from the time of the arrival of the "cotton in *London*." The cotton was delivered to the purchaser, and *Lloyd*, the intestate, drew a bill upon him for the amount, payable to the plaintiff, two months after date, for value received in cotton. The bill was accepted by the purchaser, but on presentment for payment was dishonoured, and the present action was brought, in consequence, against the administrator of the drawer. At the trial of the cause, at the sittings after last *Trinity* term, before Lord Chief Justice *Gibbs*, the *Solicitor-General*, on the part of the defendant, objected that the action could not be maintained as between the plaintiff and defendant, no consideration having passed from the former to the latter. The jury, however, under his lordship's direction, found a verdict for the plaintiff.

The *Solicitor-General* now moved that this verdict should be set aside, and a new trial granted. He admitted that, as to third persons, the intestate would have been liable; but he contended that, having drawn the bill merely as agent for the payee, from whom he had received no value for it, and who knew that he was only acting as broker in the transaction, he could not, on the dishonour of the bill, be made responsible. If it had been a bill sent to the plaintiff, as in ordinary cases, with the drawer's security added to that of the acceptor, the drawer would have been liable on the default of the acceptor; this, however, did not profess, as in general, to be a bill on which there was to be the security both of the acceptor and the drawer; and the plaintiff, he said, would certainly have had no right to demand any such security from the intestate. In all transactions of this nature, the payment by bills referred only to the security of the acceptance.

Lord Chief Justice *Gibbs*.—My opinion at the trial

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was, that, as the bill was sent in payment, all the parties to it were liable, as in the ordinary case of a bill of exchange. I considered that, however imprudent it might have been in *Lloyd* to put his name to the bill, if he did not intend to give his security, yet that, having done so, he was answerable on the acceptor's default. The transmission of the bill to the plaintiff, with *Lloyd's* name to it, would make an impression on the plaintiff, that if *Lloyd* were a solvent person, there could be no doubt as to the goodness of the instrument, and that there was no necessity to inquire into the solvency of the purchaser. It is a hard case upon the representatives of the drawer, and the court would have every disposition to assist them; but I think it is impossible that they could get over this difficulty.—*Per Curiam*,

Rule refused.

Friday, Nov. 11.

WYNN v. BELLMAN, clerk.

The court will change the venue in a penal action, on the usual affidavit, as well as in any other action.

Mr. Serjt. *Blosset* had, on a former day, obtained a rule *nisi* to change the venue in this action, which was for certain penalties incurred under the non-residence acts, from *London* to *Suffolk*, on the usual affidavit.

Mr. Serjt. *Copley* now shewed cause against it, on the ground that there was no authority which warranted this application.

Mr. Serjt. *Blosset*, *contra*, observed that there was no reason why this action should be distinguished from any other. He cited *Butterfield v. Windle* (a), which was an action on the 3 *Geo. 2. c. 26*, and though no particular clause of that act was cited, directing the action to be

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(a) 4 *East*. 385.

brought in the county where the cause arose, the court gave judgment for the defendant on the counts for those offences which were committed out of the county in which the venue was laid. [Mr. J. Heath.—In *Buller's N. P.* 195, 6, it is said, 'that the stat. 21 Jac. 1. c. 4, 'does not extend to any offence created since that statute, 'but that any subsequent statute giving a penalty in any 'court of record, is, so far, a repeal of the stat. 21 Jac. 'However, the offence must be laid within the proper 'county.']

Lord Chief Justice GIBBS.—We are discussing this point as a matter of curiosity; for the defendant moves to change the venue into the county in which the cause of action, if any, arose. Now, if the case be within the 21 Jac. 1, by carrying it into the right county, we support the action against him, which would fall to the ground if it were not carried there. If it be not within that statute, there is no reason why it should not be carried into the proper county, like any other action.—*Per Curiam*,

Rule absolute (a).

(a) By statute 31 *Eliz.* c. 5, s. 2, it is enacted, 'that in any declaration or information, the offence against any penal statute 'shall not be laid to be done in any other county, but where the contract or other matter alleged to be the offence, was in truth done; 'and that every defendant in such action or information may traverse, and allege that the offence was not committed in the county 'where it is alleged; which being tried for the defendant, or if the plaintiff be thereupon nonsuit, that then the plaintiff shall be 'barred in that action'.—In an action of *Barber v. Tilson*, Jan. 21, 1815, K. B. at *Serjeant's Inn* Hall, which was an action for penalties alleged to have been incurred under the pilot act, the venue was laid in *Middlesex*, the cause of action having arisen in *Kent*. It was objected, on the authority of 31 *Eliz.*, that the action was local :—The plaintiff contended, that that act only applied to offences against statutes already passed. The court, however, held, that the statute of *Eliz.* was still in full force, and applied to statutes passed subsequently to it; and they accordingly directed a nonsuit to be entered.

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Tuesday,  
Nov. 15.

— V. MARSHALL.

Notice of bail given on the 10th Nov.;—on the 12th, notice that other bail would be added, who would justify on the 15th :—On the 14th the latter notice countermanded, and notice again given of the original bail. They appearing to justify on the 15th, held that the last notice would be sufficient, if notice of justification had been given.

MR. Serjt. *Vaughan* opposed the justification of the bail in this action, on the ground of irregularity in the notice. On the 10th of *November*, notice was given of the persons who now appeared to justify :—On the 12th, notice was given that other bail would be added, who would justify on the present day, the 15th :—On the 14th, the second notice was countermanded, and a third notice given of the persons originally put in, and who now appeared. He contended that this, being, in fact, but one day's notice, was insufficient.

Lord Chief Justice GIBBS.—I think the plaintiff has had time enough. The notice being originally of these bail, his attention has never been withdrawn from his enquiry as to them ; because the second notice was only that others would be added, and would justify to-day.

They would accordingly have been permitted to justify, but it appearing that there had been no notice of their justification, they were rejected.

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Tuesday,  
Nov. 15.

OGLE v. ATKINSON and another.

THIS was an action of trover brought to recover the value of a quantity of hemp and flax, deposited by the plaintiff with the defendants, as warehousemen, and which they refused to restore to him. The cause was tried before the late Lord Chief Justice *Munsfield*, at the sittings after *Michaelmas* term 1813, at *Guildhall*, when a verdict was found for the plaintiff, subject to the opinion of the court upon a case, which, in substance, was as follows:

In the spring of the year 1809, the plaintiff consigned a parcel of wine to Messrs. *Smidt* and Co. at *Riga*, for sale on his account; and in 1810 he directed them to purchase a quantity of goods for him, comprising the hemp and flax in question, in return. In *April* in that year, the plaintiff sent a ship of his own to receive the goods so ordered; and on the ship's arrival at *Riga*, the captain received them from *Smidt* and Co. *on behalf of the plaintiff*, and *as the plaintiff's own goods*, which *Smidt* and Co. stated them to the captain to be. These goods not being sufficient to fill the ship, *Smidt* and Co. procured other goods to be shipped on freight. The captain, by agreement with the plaintiff, (his owner) was to have an allowance of £15 *per cent.* *primage* upon the freight

bill of lading is accordingly indorsed to *C.* The ship arrives, and *C.* demands the cargo, as indorsee of the bill of lading; the captain, however, refuses, and delivers them to *A.*, who deposits them with *D.*, as his warehouseman. *D.* then receives notice from *B.* to hold the goods for *B.* as his property, in consequence of which, *D.* refuses to re-deliver them to *A.*—In an action of trover by *A.* against *D.*:—*Held* 1st, that *D.* was not estopped, by having received the goods as the warehouseman of *A.*, from setting up the claim of a third person as a defence, supposing that claim so be a good one:—2dly, that *A.*, having vested his claim on the supposition that the property had vested in him, could not, if he failed in that defence, set up his lien on the goods for freight:—But 3dly that, though the goods might have been delivered to the captain on condition of *A.*'s accepting the bills, yet that, as no such condition was imposed at the time of the delivery, that delivery was complete, and vested the property absolutely in *A.*

*A.* consigns goods to *B.* abroad, and orders a cargo in return, for which he sends his own ship. The return cargo is delivered to *A.*'s captain, *B.* stating it to be on *A.*'s account, as *A.*'s own goods, and to be delivered to *A.*

The return cargo consisting of more goods than the proceeds of those consigned to *B.*, *B.* draws bills on *A.* for the difference, which he sends to his agent, with a bill of lading drawn in blank, and desiring the agent, in case of *A.*'s refusal to accept the bills, to indorse the bill of lading to *C.* *A.* refuses to accept the bills, and the

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which the ship should earn from *Russia*, which was to be estimated as well upon the plaintiff's goods, as upon those which were actually to pay freight. On the latter goods, the freight was at the rate of £10 *per* ton, but *Smidt* and Co. insisted that the goods received for the plaintiff should be estimated at £8 *per* ton only, considering that the plaintiff was entitled to this distinction.—Previously to the ship leaving *Riga*, *Smidt* and Co. wrote to the plaintiff, inclosing him the invoices of the goods, and advising him that the ship was ready to sail with the goods shipped on his, the plaintiff's, account. After the captain had received the goods on board, *Smidt* and Co. delivered to him a bill of lading for his signature, with a blank for the name of the consignee. The captain at first objected to sign it without the name of the consignee, but at length complied, on receiving an assurance from *Smidt* and Co., that that circumstance was of no consequence, *as the goods were to be delivered to his owner*. In a letter to their agent in *London*, *Smidt* and Co. stated that they should make out *Ogle's* bill of lading to order, that in case of his not accepting their bills, Messrs. *Ruckers*, merchants in *London*, and the payees of the bills of exchange, might become possessors of it; and they directed their agent that, in case their bills, amounting to £2500, (being the excess of the value of the shipment from *Riga*, above the proceeds of the wine which had been sent by the plaintiff to *Smidt* and Co.) should not be accepted, he would otherwise dispose of the bills of lading, and let Messrs. *Ruckers* receive the goods and dispose of them. Accordingly, before the ship arrived, the agent of *Smidt* and Co. called upon the plaintiff, and stated that his principals had drawn bills upon him, the plaintiff, for the amount of the balance due to them; which bills were in the hands of Messrs. *Ruckers*, and which the agent requested him to accept:—The plaintiff, however, refused,

and the agent, in consequence, indorsed the bill of lading to Messrs. *Ruckers*.—The vessel arrived in *London* in *September* 1810; but before any of the goods were delivered, Messrs. *Ruckers* laid claim to them, as indorsees of the bill of lading; the captain, however, refused to deliver the goods to them, and handed them over to the plaintiff, who deposited them with the defendants, as warehousemen, upon his account. The defendants, having received notice from *Smidt* and Co. to hold the goods on their account, refused to deliver them to the plaintiff, though the latter had tendered the defendants their charges. No offer had been made to pay the plaintiff his freight, as owner of the ship. The question for the opinion of the court was, whether the plaintiff were entitled to recover from the defendants the value of the goods so deposited with them:—If he were, then the present verdict was to stand; if not, a nonsuit to be entered.

Mr. Serjt. *Vaughan*, for the plaintiff, made two preliminary points:—*First*, that from the relation which subsisted between the plaintiff and the defendants, the latter having received the goods from the former as his warehousemen, and on his account, and having been tendered their charges for warehouse room, the defendants were not at liberty to avail themselves of any defect which there might be in the plaintiff's title to the goods. This case, he said, was like that of a carrier, who cannot dispute the title of a person who delivers goods to him for conveyance.—He cited *Meuron v. De Mello*, before Lord *Ellenborough*, at *N. P.*, which was an action for money had and received; the plaintiff having paid into the hands of the defendant a sum of money, which he had received under a power of attorney for a third person. Lord *Ellenborough*, in that case, held that the de-

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defendant could not set up the title of that third person, as a defence to the plaintiff's claim. [Lord Chief Justice *Gibbs*.—That reminds me of a case which was decided in this court (a), where a person had paid over a sum of money, as agent for several persons, to a banker; the court held that the banker could not take notice of the respective rights of the different proprietors, but was answerable only to the person from whom he received it. But that was a very different case from the present. The question here is, whether, if the defendants had delivered the goods to the plaintiff, and it should afterwards have appeared that the property was in another person, the defendants would not have been answerable over to those in whom the property should be adjudged ultimately to vest.]—*Secondly*, he contended that the plaintiff, having brought the goods over to this country, was at least entitled to the possession of them, till he was paid his freight, of which no offer had been made to him.—[Lord Chief Justice *Gibbs*.—The plaintiff might have stood upon that ground; but as he has chosen to rely on the absolute property, which he contends has vested in him, he cannot, if he fail in supporting that position, turn round upon the strength of his lien for freight.]—The *third*, and main ground of his argument was, that the property had absolutely vested in the plaintiff. He had been debited with the amount; the goods had been shipped in his vessel, and at his risk; the captain was his servant, and the delivery to him was a complete and absolute delivery to the plaintiff. At the time of that delivery, there was no intimation to the plaintiff that it was on condition that he would accept the bills of *Smidt and Co.*, the breach of which condition, it was now to be contended, had divested the property out of the plaintiff.

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(a) *Pinto v. Santos*, ante, p. 132.

On the contrary, the goods were delivered to the captain "on behalf of the plaintiff," and "as the plaintiff's own goods." The only way to consider this question was as between *Smidt* and Co. and the plaintiff; for the captain had no authority to sign such a bill of lading, and the bill itself was nugatory. Perhaps, as between *Smidt* and Co. and the captain, the latter might be liable to an action for his breach of contract, in not delivering the goods according to the bill of lading which he had signed; but the question as between *Smidt* and Co. and the plaintiff, was only how far this property had vested in the latter, and how far it was liable to be divested *in transitu*. [Lord Chief Justice *Gibbs*.—Stoppage *in transitu*, properly speaking, can only take place when there is an insolvency, and there is no pretence to say that there was any insolvency in the present case.] This was very different from a delivery to a chartered ship, because there, the owner's rights are to be taken into consideration. In *Bobtlingk v. Inglis* (a), it was decided that the master of a ship, chartered wholly by the consignee, is a carrier in whose hands goods may be stopped; but in *Fowler v. M<sup>c</sup> Taggart* (b), it was held that, where a ship is hired and fitted out by the consignee, and goods are put on board to be sent by him on a mercantile adventure, the consignor cannot stop them; the consignee being in that case the owner of the ship *pro tempore*, and the delivery of the goods on board being equivalent to a delivery into his warehouse. If that principle were correct in the case cited, it must be doubly so in the present instance, because here, the captain had the entire control of the ship, as the plaintiff's agent or servant. As to the supposed condition, on which the defendant would rest

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(a) 3 *East*. 381.—(b) Cited 3 *East*. 381, and *Abbott* on Shipping, p. 386, 4th ed.

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his argument, the case of *Coxe v. Harden* (a) would be a complete answer to that. There, the shippers of the goods in question, which had been ordered by the consignees, sent a bill of lading to the consignees, without indorsement, informing them, at the same time, that they had drawn upon them for the amount of the goods, *not doubting that their bill would meet due honour*. The consignees, however, did not accept it, and delivered the bill of lading, unindorsed, to the defendants, who thereby obtained possession of the goods. The shippers also sent a bill of lading to the plaintiffs, indorsed to them, for the purpose of securing the amount of their bill upon the original consignees. The court of *King's Bench* held that, supposing the plaintiffs in that case to stand in the situation of the shippers, still they would not be entitled to recover; because, the goods having been purchased by order of the consignees, and shipped for their use, and at their risk, they were entitled to the possession of them as soon as they arrived; the shippers not having stopped them *in transitu*. That case, he said, was exactly similar to the present, except that the circumstances of the present case were still stronger in favour of the plaintiff, than those of *Coxe v. Harden* were in favour of the defendants there. For as the shippers in that case had informed the consignees that they had drawn upon them for the amount of the goods, it might with some colour have been contended that a condition had been annexed to the transaction, without the performance of which, the delivery would have been incomplete; whereas, in the present case, the restriction was attempted to be imposed, merely on the strength of what had passed between *Smidt and Co.* and their agent; to whose negocia-

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(a) 4 East. 211.

tions the plaintiff was no party, and would never have consented to such a condition being imposed.

Mr. Serjt. *Lens*, on the part of the defendants, was stopped by the court from arguing on the two first points made by the other side. With regard to the third question, he contended that the plaintiff was not entitled to the possession of the goods. There was no doubt, he said, but that they were the goods of the plaintiff; that they were sent in his ship, in the care of his servant, and for the purpose of being delivered to him; but the question was, whether the property were indefeasibly his, or whether there had been only a limited and conditional delivery of it. Messrs. *Smidt* and Co. wished to have a security for the money which had been laid out by them in the purchase of the goods, and they, therefore, directed the goods to be delivered, or not, to the plaintiff, according as he should, or should not, honour their bills:—They had an interest to protect, and they had an undoubted right to fetter the property with this condition, in order to protect that interest. This limitation was coeval with the actual transmission of the property, and formed part of the same transaction; and the plaintiff, he contended, was not at liberty to avail himself of part of the contract, and refuse to execute his share of it. It was on his refusal to perform the condition, that this diversion of the goods from their intended destination was made. [Lord Chief Justice *Gibbs*.—Suppose notice of the ship having been lost had been given before any thing had been said about the bills; whose loss would that have been?] Certainly it would have been at the plaintiff's risk; for the property would ultimately have been his, and *Smidt* and Co. had only a lien or check upon it, which, if the ship had been lost, they would have been deprived of. The bill of lading had been left open purposely that, in case the plaintiff failed to comply with the

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condition, the destination of the goods might be altered: If it had been intended that there should be an absolute and unqualified delivery, the plaintiff's name would have been inserted. He distinguished this from the case of *Cone v. Harden*, because there, the goods had got into the possession of the indorsee of the bill of lading, before there was any stoppage or countermand of the authority to deliver them. In that case, the shippers trusted that their bills would meet due honour, and did nothing to provide against the contrary event; and it was on the circumstance of there having been no stoppage *in transitu*, that the judgment was founded. Here, on the contrary, there had been an intervention on the part of *Smidt and Co.* by the notice which they had given to the defendants; and that notice, he said, was equivalent to a stoppage *in transitu* in the case of bankruptcy. Every thing, therefore, that could be done on the part of *Smidt and Co.* had been done, but the occasion to take advantage of the condition did not arise until the plaintiff's refusal to accept their bills; upon which, Messrs. *Ruckers'* name had been inserted in the bill of lading. Unless, therefore, there were something unlawful in the shipper's sending goods with this condition annexed; or unless the plaintiff's right were paramount to such right of the shippers, the defendants were justified in keeping possession of the goods.

Mr. Serjt. *Vaughan*, in reply, was stopped by the court.

Lord Chief Justice *Gibbs*.—This action is brought for the purpose of recovering the value of a quantity of hemp and flax, which the plaintiff had deposited with the defendants, and which the defendants insist that they are not bound to redeliver to him, on the ground that the property had not vested in him, but was still in *Smidt and Co.*, from whom they had received notice not to deliver it up. Two preliminary questions have been made on

the part of the plaintiff. One was, that the defendants were not at liberty to set up the title of *Smidt* and Co. as a defence, in as much as it was not from *Smidt* and Co., but from the plaintiff, that they had received the goods. Upon that point, I shall only observe that, if the property were in others, and the defendants had notice of that circumstance, they might set it up as a defence to the present action. *Secondly*, it has been insisted that, wherever the property may reside, the plaintiff has, at all events, a lien on the goods for the freight of them. He might have had such a lien, but he cannot, because he fails in substantiating his claim to the property of the goods, set up that lien as a defence. And this brings the case to the third and real question, which is, whether *Smidt* and Co., or the plaintiff, be the right owner. This depends on the question, whether the goods have or have not been really delivered to the plaintiff. It is true that they might have been delivered to the captain, for the purpose of being handed over to the plaintiff conditionally, as has been stated on the part of the defendants; and certainly in that case, if the condition had not been complied with, the plaintiff would have forfeited his claim to them, and could not have supported the present action. But the question is, whether, in point of fact, they were delivered with such a condition. The parties themselves shall answer that. In the first place, the goods were delivered without any order or direction by *Smidt* and Co. to the captain, and there was no intimation to the plaintiff, by the agent of *Smidt* and Co., that bills would be drawn upon him. The goods are said to be purchased on account of the plaintiff; and no doubt a delivery on board his ship would be a complete delivery to himself, unless, at the time of that delivery, it were qualified by any condition. Then, what passed on the delivery of the goods on board the ship? Was there any qualification of that

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delivery? The captain received them on behalf of the plaintiff, and according to the statement of *Smidt* and Co. themselves, *as the plaintiff's own goods*. I take the words "*as his own goods*" to mean, that they were the property of the plaintiff absolutely, and without any condition or qualification. Then, does what passed afterwards alter the case? Before the captain can be dispatched, he must sign a bill of lading. He objects to sign it, because the name is left in blank. According to my brother *Leas*'s argument, the answer should have been, 'that the plaintiff was not to be the consignee, unless he accepted the bills which were drawn upon him; and therefore, that the bill of lading was drawn in blank, because it was uncertain who would be the consignee.' The answer, however, of *Smidt* and Co. was, 'that it was of no consequence, for that the captain was to deliver the goods to his owner.' The omission of the name, therefore, was of no importance; and if it were of no importance, it was a fraud on the plaintiff. The goods, therefore, having been delivered absolutely to the plaintiff, the property vested in him, and he is, consequently, entitled to his action.

Mr. Justice HEATH.—I am of the same opinion. There has been a complete delivery to the captain, who was the plaintiff's agent, and nothing has been shewn which can be construed to divest the property out of the plaintiff. This would remind one of the mental reservation adopted by the Jesuits; for nothing of the kind was communicated to the plaintiff.

Mr. Justice CHAMBRE.—I am also of the same opinion. This is a perfectly plain case: The delivery was unaccompanied by any circumstance to shew that any thing further was necessary to complete it; and there is nothing to induce us to put a different construction upon it.

Mr. Justice DALLAS.—I have not been able, through-

out the whole of the argument, to entertain the least doubt upon any part of this case. It is admitted, on the part of the defendants, that the delivery to the captain was absolute, unless it were qualified at the time. Was there any condition imposed? So far from it, it was absolutely disclaimed by the answer of *Smidt* and Co. to the captain, on his refusal to sign the bill of lading.

*Postea* for the plaintiff.

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COOK v. BIRT, sheriff of SURRY.

Friday,  
 Nov. 18.

THIS was an action against the sheriff of the county of *Surry*, and the plaintiff declared that the defendant, on the 28th of *April* 1814, broke and entered his dwelling-house, and made a great noise and disturbance therein, and continued making such noise and disturbance for a long space of time, to wit, from thence until the commencement of this suit.—The defendant pleaded *first*, the general issue; *secondly*, as to the breaking and entering the plaintiff's dwelling-house, and making a noise and disturbance therein, and staying and continuing therein for a part of the said time in the declaration mentioned, *to wit, for the space of two days*, and thereby, during that time, a little disturbing, &c., the defendant justified under a writ of *fiery facias*, issued against the goods which were

In trespass for breaking and entering the plaintiff's house, and continuing therein from &c. till the commencement of the suit; the defendant, as to the continuing in the house for a part of the time, "to wit for the  
 "space of two  
 "days," justifies as sheriff, under a *fi. fa.* issued against the goods of *T. K.*, deceased, in the hands of the plaintiff's wife,

as administratrix, to be administered; and that, having just grounds to believe that there were goods in the plaintiff's house liable to be seized, he entered to search for the same, and staid therein for the space of time in the declaration mentioned, *the same being a reasonable time in that behalf*. The replication alleges that the two days mentioned in the plea were an unreasonable length of time for the defendant's searching for the goods; and then new assigns:—*Held*, on special demurrer, 1st, that the replication was bad, in having tendered an immaterial issue, and also as being double:—2dly, that the defendant was justified in entering the plaintiff's house, by his belief that the goods were there; though that belief were not justified by the event.

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of one *Thomas Keell*, deceased, at the time of his death, in the hands of one *Frances Cook*, administratrix of the said *T. Keell*, before her intermarriage with the plaintiff, to be administered ;—or, in the hands of the plaintiff and *Frances* his wife, in right of the said *Frances*, as such administratrix, since their intermarriage, to be administered: By virtue of which writ, the defendant, having just and reasonable ground to suspect and believe, that there then were goods in the said dwelling-house, liable to be taken in execution under the said writ, did, in due form of law, peaceably enter into the said dwelling-house, (the outer door being open) in order to search for and take in execution such goods as were so liable, and did then and there search for such goods; and in so doing, did necessarily make a little noise and disturbance, and staid and continued therein for the said space of time in the declaration mentioned, *the same being a reasonable time in that behalf*, as he lawfully might for the cause aforesaid.—The plaintiff, in his replication, after protesting that the second plea was wholly insufficient in law, alleged that the said space of two days, in the introductory part of that plea mentioned, and during which time the defendant had by that plea admitted that he staid and continued in the said dwelling-house, making a noise and disturbance therein, was too great and unreasonable a space of time for the defendant's searching therein for goods liable to be taken in execution, and concluded to the country. Then the plaintiff proceeded to state, that he brought his suit, not only for that the defendant, on the said 22nd of *April*, broke and entered the said dwelling-house, and made a great noise and disturbance therein, and continued so doing for the said space of two days, (being too great and unreasonable a time) but also for that the defendant, at the said time when, &c. continued in the said dwelling-house,

making such noise and disturbance, from thence until the commencement of this suit, being a much longer space of time than the space of two days in the second plea mentioned; wherefore, inasmuch as the defendant had not, in his said second plea, answered the said breaking and entering of the said dwelling-house, and staying and continuing therein, in so far as the said staying and continuing in the said dwelling-house exceeded the said space of two days, in the second plea mentioned, the plaintiff prayed judgment, &c.—The defendant demurred to this replication and new assignment, shewing for causes,—*first*, that the second plea contained a distinct answer and justification to the single act alleged in the declaration, in answer to which plea, the plaintiff could not, by law, put more than one single fact in issue; whereas, by his replication and new assignment, he had attempted to put several distinct facts in issue on the second plea; viz. that the space of two days was an unreasonable time for searching the said dwelling-house, and also that the defendant continued therein for a longer time than two days:—And also that the said replication and new assignment were double and multifarious, and led to no certain or definitive issue; and that the plaintiff had thereby treated the space of two days, mentioned in the second plea, as a certain and definitive space of time, and had supposed the defendant to have admitted, by that plea, that he continued in the said house for the entire space of two days and no more; whereas he had admitted by his said second plea, that he continued therein for a reasonable space of time, and not for any certain time; and that the plaintiff, having complained in his declaration of a breaking and entering on the 28th of *April*, had attempted to put in issue the breaking and entering on the 22d of *April*, being a different and longer period of time

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as having traversed an immaterial allegation, but also as being double (a).]

Mr. Serjt. *Lens* admitted that the replication could not be sustained.—With regard to the second plea, he contended that the general principle which governed these cases was, that the officer was justified or not by the event; and that he could not set up his bare suspicions that the goods were in the house, as a justification. He cited *Bostock v. Saunders* (b), where the court held that an excise officer was liable to an action for an unsuccessful search after run goods, and where Lord C. J. *De Grey* laid down the principle which he was now contending for; viz. that the officer acted at his peril; and that the search was lawful, if the goods were in the house;—unlawful, if not there (c). The defendant, therefore, should either have averred that the goods were actually in the house, or should have shewn some authority to justify his deviation from established principles; for it could not be the intendment of the law, that the property was naturally and *prima facie* to be found in the plaintiff's house, merely because he was the husband of the intestate's administratrix. In support of this position, he cited *Biscoe v. White* (d), where the defendant justified his entry into the plaintiff's house, under a *feri facias* against the goods which were of *Philip Biscoe*, the testator, at the time of his death in the hands of *Lucretia Biscoe*, his executrix;

(a) So in *Cheasley v. Barnes*, 10 East 73, where the defendant justified severally to the several trespasses complained of, and the plaintiff, in his replication, took issue upon the facts of the justification, and also new assigned; the court held the replication and new assignment to be double, and therefore bad.—See also *Adney v. Vernon*, 3 Lev. 243, there cited.

(b) 2 Bl. 912. and 3 Wils. 434. S. C.

(c) By the judgment of Lord C. J. *De Grey*, however, it seems that the court made an express distinction between the case of an excise officer entering to search for prohibited goods, where he is acting for his own interest, and that of a sheriff's officer executing process which is imperative upon him.

(d) *Cro. Eliz.* 759.

and said that the executrix was in the plaintiff's house, *cum bonis suis*, and there abided. The court, on demurrer, held the plea to be bad, because it did not allege that the testator's goods were in the house, but only those of the executrix, which were not liable to execution. [Lord C. J. Gibbs.—But there, the plea only stated that the defendant went into the house to look for the goods which the executrix had of the testator, without averring that she was the plaintiff's wife. Indeed, if she had been his wife, the plea would never have stated that she *abided* in his house.] The case of *Ratcliffe v. Burton*, he contended, afforded no decided authority for the defendant's argument, since that was decided on a question which bore no analogy to the present case. Nothing less than an absolute taking of the goods could be considered as an execution, and if the courts had decided otherwise, that decision would have been a deviation from the principles of the common law, and should have been adduced, in the present instance, on the part of the defendant.

Mr. Serjt. *Copley*, in reply, was stopped by the court.

Lord Chief Justice GIBBS.—I have no doubt but that the distinction which has been taken by my brother *Copley* is the true one; *viz.* that under a *feri facias*, the sheriff cannot, on suspicion, enter the house of a stranger; but that he may enter that of the defendant, and that the sheriff's justification, in that case, does not depend upon the event of the goods being in the house; because he is looking for the goods in that place, where alone he can have any reasonable expectation of finding them, *viz.* in the house of the person against whom the writ issued. Wherever the defendant has goods, the sheriff may enter, provided the outer door be open:—But if he enter the house of a stranger, his justification must then depend on the event of his finding goods in the house. The question, then, is, whether the plaintiff be or be not

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to be considered as a stranger to the writ which the sheriff entered to execute. Being ordered to levy the goods of the intestate, where can he look for them except in the plaintiff's house? The plaintiff's wife is administratrix of the deceased; and when the plaintiff married her, he is supposed to have taken her with all her possessions;—his house, therefore, was that in which the goods were most naturally to be looked for, and that is the principle on which we must decide, whether the officer were justified or no. There is no case exactly in point; but the principle of those which have been decided goes the whole length of the present case.

Mr. Justice HEATH.—I am of the same opinion. The plaintiff cannot be considered as a stranger, for he has married the administratrix, and therefore, as such, must be answerable for her goods.

Mr. Justice CHAMBRE.—The entry was warranted by the general rules of law; I think, therefore, that it lay with the plaintiff to cite cases to impeach those rules, rather than with the defendant to support them.

Mr. Justice DALLAS.—The general rule is, that wherever the defendant has goods, the sheriff may enter. If it be the house of a stranger, he is justified or not by the event; that is, as he does or does not find the goods. The present plaintiff marries the administratrix, in whose possession the goods were; her possession becomes his; he, therefore, was the person to whom the sheriff would naturally look.

Judgment for the defendant.

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Saturday,
Nov. 19.

TOPPING v. FUGE, and another.

THIS was an action of replevin, which was removed into this court by writ of *recordari facias loquelam*, returnable in eight days of *St. Hilary* 1813:—In *Michaelmas* term 1813, the plaintiff signed interlocutory judgment, which was set aside, in *Hilary* term following, for irregularity in the service of the process.—On the 14th of *May* 1814, the plaintiff took out a summons, returnable on the 20th of *May*, to compel an appearance to the writ of *Hilary* term 1813, which was personally served on the defendants;—and on the 4th of *June* following, no appearance being entered, the plaintiff entered an appearance for them:—A declaration, entitled as of *Hilary* term 1814, had been filed in *Easter* term 1814; and on the 22d of *June*, judgment was signed for want of a plea.

If the declaration be not entitled of the term in which the writ is returnable, or of that of appearance, it is irregular; and a judgment signed for want of a plea thereto is also irregular.

The *Solicitor-General*, in last *Trinity* term, obtained a rule, calling on the plaintiff to shew cause why this judgment should not be set aside for irregularity, on three grounds. *First*, that this was not a case within the stat. 51st Geo. III. c. 124, s. 2, authorizing the plaintiff to enter an appearance for the defendant(a). *Secondly*, that the plaintiff was out of court, by not having proceeded

(a) That section, after reciting that the stat. 12 Geo. I. c. 29, and 5th Geo. II. c. 27, "were not deemed to extend to proceedings by original and other writs, whereupon no *capias* was issued," enacts, "that, in all cases where the plaintiff proceeds by original or other writ, and summons or attachment thereupon, no writ of *distringas* shall issue for default of appearance, but the defendant shall be personally served with the summons or attachment, with a notice of the meaning thereof:—But in case the defendant cannot be so served, then the plaintiff, by leave of the court, may sue out a *distringas* to compel his appearance:—And if the defendant do not appear within eight days after the return of such writ or *distringas*, the plaintiff may, on affidavit of the personal service of such summons or attachment and notice, or of the due execution of such *distringas* and notice, enter a common appearance for the defendant, and proceed as if the defendant had entered his appearance."—See the mode of proceeding on *recordari facias loquelam*, and of compelling an appearance thereon in 1st *Tidd*, 474, et seq.

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within two terms after the return of the *recordari facias loquelam*; more than four terms having elapsed between that return and the notice to appear of the 14th of May 1814, which was the first step taken after it. *Thirdly*, that the declaration was doubly irregular; 1st, in not being entitled as of the term in which the writ was returnable; 2dly, in having been filed before appearance; viz. in Easter term; appearance not having been entered till the 4th of June following.

Mr. Serjt. *Vaughan* and Mr. Serjt. *Copley* now shewed cause against the rule. Being called upon by the court to direct their argument to the third objection, they contended that, as to the declaration having been filed apparently before appearance, whenever the appearance was entered, it must be considered as relating back to the return of the writ, which was previous to the time when the declaration was filed:—In the same manner, in trespass *quare clausum fregit*, the appearance was to the original writ, and not to the *distringas*. With regard to the title of the declaration, they contended that, though it was usual for the declaration to be entitled of the term in which the writ was returnable, yet that it was not absolutely necessary. The reason for so entitling the declaration in general was, that the party was formerly supposed to appear personally in court in that term; and even if it were delivered of a subsequent term, it was still entitled as of the term in which the writ was returnable. As the practice, therefore, had originated in fiction, a deviation from it could only be considered as a formal error, which would not appear on the plea-roll, or issue-roll, or on any of the subsequent proceedings, and which, therefore, the defendants could not take advantage of after judgment. It was a defect that was cured by the statutes of jeofails, which had been expressly extended to judgments by default^(a). The court would not set aside proceedings for

(a) 4 Ann. c. 16, s. 2. By that section it is enacted, 'That no

a variance between the original writ and the declaration (a); and that was of much greater importance than a wrong title to a declaration. [The court seemed at first to doubt whether a *recordari facias loquelam* were an original writ; but on referring to *F. N. B.* 70, it appeared that it was.] In the case of a declaration having been filed before the cause of action arose, the court, they said, on motion to arrest the judgment, always enquired whether the motion were against the justice of the case, or whether the issue of the suit were in question, before they granted it; and the present case, they contended, fell within the principle of that practice. At all events, the defendant could not treat the declaration as a nullity, and set aside the proceedings, after the plaintiff had gone on to judgment, as if there had been no declaration.

The *Solicitor-General* *contra*, after observing that this was a mere question of practice, and was not affected by the statutes of jeofails, was stopped by the court.

Lord Chief Justice GIBBS.—This is not, as has been contended, the case of a *variance* between the original writ and the declaration; it is a plain question of *practice*, *viz.* whether the defendants were bound to plead to this declaration. It was entitled as of *Hilary* term, 1814, which was neither the term of the appearance, nor that in which the writ of *recordari facias loquelam* was returnable, and therefore, was not a term in which, according to the rules of the court, the plaintiff was entitled to file a declaration. Judgment has been entered up, and the defendants now come to the court to be relieved from it. I think they are entitled to that relief; for the declara-

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* judgment by confession, *nihil dicit*, or *non sum informatus*, or on any writ of inquiry, shall be stayed or reversed for any imperfection, omission, defect, &c. which would have been aided by any of the statutes of jeofails, in case a verdict of twelve men had been given in the action, so as there be an original writ, and warrants of attorney duly filed.

(a) *Spalding v. Mure*, 6 T. R. 363.

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tion was irregular, and therefore, the judgment which is founded upon it is bad.

The rest of the court concurred.

Rule absolute.

Monday,
Nov. 21.

The KING v. The sheriff of MONMOUTH, in a cause of

LEWIS v. ROBERTS.

If, to a writ of *venditioni exponas* for goods already taken in execution, with a clause of *feri facias* for the residue, the sheriff return that he has made of the said goods £20, but omit, by mistake, to return *nulla bona* to the *feri facias*, the court will allow the sheriff to amend the return, and will set aside an attachment issued against him for not making the return.

IN this cause, a writ of *feri facias*, at the suit of *Lewis*, against *Roberts*, was issued on the 29th of November 1813, to the sheriff of *Monmouth*, with directions to levy the sum of £92 : 8s. : 5d., returnable on the 20th of January following. On the 27th of January 1814, the sheriff, having been ruled to return the writ, returned that he had levied of the goods of the defendant to the amount of £30, which remained in his hands for want of buyers. On the 10th of June, a writ of *venditioni exponas* for the said goods, with a *feri facias* for the residue, issued, directed to the same sheriff, who returned that he had made of the said goods the sum of £20, which money he had ready; but he omitted, by mistake, to make any return to the *feri facias* contained in the writ, in consequence of which omission, an attachment issued against him. The sheriff then offered the plaintiff to pay him the sum of £74 : 14s. : 8d, being the amount of the debt and costs claimed by the plaintiff, provided the latter would hold it conditionally, till the result of the sheriff's application to the court should be known. The plaintiff, however, refused to take the money, with that condition; and the sheriff then paid it into the hands of the coroner, with notice to retain the same, until the court could be moved for leave to amend the return of the latter writ.

The *Solicitor-General*, accordingly, on the first day of

this term, obtained a rule to shew cause, why the return of the writ of *venditioni exponas* and *feri facias* should not be amended by returning *nulla bona* to the *feri facias* clause of the writ, and why all further proceedings on the attachment should not be stayed; and why the sum of £74 : 14s : 8d should not be returned by the coroner to the sheriff. This was moved on the affidavit of the under-sheriff, which stated that, to the best of his knowledge, the defendant was possessed of no other goods, than those which had been already taken under the former writ of *feri facias*:—That it was found impossible to dispose of the said goods for more than £25, and that extraordinary expences had been incurred, which amounted to more than £5:—And that the return to the last *feri facias* had been omitted by the mistake of his clerk.

Mr. Serjt. *Vaughan* now shewed cause against the rule, on the affidavit of the plaintiff's attorney, which stated, that he had been informed that the defendant was possessed of property more than sufficient to satisfy this execution:—That after the first writ of *feri facias* had issued, two other executions, at the suit of different persons, had been levied upon the defendant, and paid; and that no warrant had been issued on the *feri facias* clause of the second writ.—He contended that this could not be considered as a mistake on the part of the sheriff, which the court would allow him to rectify. He had admitted, by his return to the first writ, that he had levied goods to the amount of £30; if he were not certain that the goods would produce that sum, he should merely have returned that he had levied certain goods, which remained in his hands for want of buyers, without specifying any particular sum. To the writ of *venditioni exponas* the sheriff had returned £20, whereas the goods had been sold for £25.—He had no right, he said, to retain more than his poundage.

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Lord Chief Justice GIBBS.—If the fact be as you state it, the plaintiff himself might have made this motion, and might then have brought his action for a false return. It cannot be expected that, after an affidavit that this was a mere mistake of the under-sheriff's clerk, we shall leave the sheriff without remedy; especially when we consider that, if the plaintiff have any remedy, that will be granted him by allowing this amendment. For if the defendant be in possession of any other goods, the moment the writ is amended, by returning *nulla bona*, the plaintiff may bring his action. Supposing that the sheriff ought to have issued his warrant, the court will not, on that ground, leave him without remedy.—*Per Curiam*,

Rule absolute, on payment by the sheriff of the costs of the attachment, and of this application.

Monday,
Nov. 21.

WALKER v. BARNES.

If a plaintiff, after a verdict found for the defendant, but before judgment signed, become bankrupt, the costs are not a debt proveable under the commission; and execution for them may issue against him, notwithstanding his certificate.

MR. Serjt. *Best*, on a former day in this term, obtained a rule calling on the defendant to shew cause, why the writ of *fiery facias*, issued and executed on the judgment which had been signed for him, the defendant, should not be set aside; and why the sum of £38 : 5s, levied by the sheriff under the said writ, should not be restored to the plaintiff; he having obtained his certificate under a commission of bankrupt issued against him. It appeared that the cause was tried on the 8th of July 1813, when a verdict was found for the defendant, with liberty to the plaintiff to move to set it aside;—that, on the 9th of November following, a commission of bankrupt issued against the plaintiff, on which day, the plaintiff moved for and obtained a rule *nisi* to set aside

the verdict;—that, on the 24th of the same month, the rule having been previously discharged, the defendant signed judgment and taxed his costs;—and that, on the 3d of *October* 1814, the plaintiff having in the mean time obtained his certificate, the defendant issued a writ of *fiery facias* for the amount of his costs, which was the writ in question. This motion was founded on the authority of *Watts v. Hart*(a), where the plaintiff having become bankrupt after nonsuit, and before judgment, this court held that the costs of the nonsuit were a debt proveable under the commission. The only difference between the two cases, he said, was, that, in the case cited, the plaintiff was nonsuited; in the present case, a verdict had been found for the defendant; but in either case, he contended, the plaintiff was discharged by his certificate. A rule *nisi* was accordingly granted, and on this day,

The *Solicitor-General* shewed cause. He contended that, though the verdict was obtained by the defendant previously to the commission, yet, as the judgment could not have been entered up, and the costs taxed, till after the commission had issued, since the rule for setting aside the verdict was not discharged before, the plaintiff was not liable for them till that time. No debt could accrue from the plaintiff to the defendant till after judgment; nor, consequently, till after the bankruptcy. [Lord Chief Justice Gibbs.—This question was agitated in the case *Ex parte Charles* (b), where the court of *King's Bench* decided, that a plaintiff having recovered damages against a defendant, who, between verdict and judgment, committed an act of bankruptcy, the debt due upon the judgment was not a good petitioning creditor's debt whereon to found a commission. The *King's Bench* acted with great deliberation

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(a) 1 B. and P. 134.

(b) 14 East. 197.

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in that case, because, by their judgment, the former decisions on that subject were overturned.] That decision, the *Salicitor General* said, was quite sufficient for the support of his argument; but independently of that, the case on which the plaintiff rested his motion had been decided contrary to principle, and against the opinion of the court, as appeared by the judgment of Lord Chief Justice *Eyre*.

Mr. Serjt. *Best*, being called upon to support his motion, endeavoured to distinguish the present case from that *Ex parte Charles*.

Lord Chief Justice GIBBS.—It is impossible to distinguish the two cases. We should not alter our opinion, merely in compliance with the decision of another court, without considering the reasons on which that decision was founded; and I think that the case *Ex parte Charles* was decided more according to the reason of the case than the previous decisions. It is true that the defendant was entitled to tax his costs, by virtue of the verdict which was found for him; but those costs did not become a debt due from the plaintiff to him, till the judgment was entered up, by which the defendant was entitled to recover them. One cannot try the question better than by asking, whether an action could have been brought before judgment was signed.

Mr. Justice HEATH.—I think the case *Ex parte Charles* was decided on the true grounds. In the case of *Watts v. Hart*, the court gave judgment contrary to their own inclination, considering themselves bound down by the previous decisions.

Mr. Justice CHAMBRE and Mr. Justice DALLAS concurred.

Rule discharged.

HARRISON v. HANNEL.

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Monday,
Nov. 21.

THIS was an action by the indorsee, against the acceptor of a bill of exchange, which had been drawn and accepted under the following circumstances. The plaintiff had advanced different sums of money to the defendant's son on usurious interest; and the latter, being indebted to the plaintiff on those transactions, and also for goods sold to him, and work done for him, by the plaintiff, to the amount of £300, applied to the plaintiff to advance him the further sum of £150. The plaintiff agreed to do this, without reserving more than the usual rate of interest; on condition that he would get his father, the defendant, to give him his acceptance for that amount, and also to guarantee £100 of the debt then due from his son to the plaintiff. The defendant acceded to this proposition, and his son, accordingly, drew on his father, one bill for £50, and two others for £100 each; the first being made payable at three months, the second at six, and the third at nine months; these bills the defendant accepted, and they were then indorsed by the son to the plaintiff. The first bill was paid when it became due, and this action was brought on the defendant's refusal to pay the second. At the trial of the cause, at the sittings after last *Trinity* term, at *Guildhall*, the Chief Justice observed that, as the defendant's acceptances had been deposited as a security for the whole transaction, legal and illegal, no specific appropriation having been made of them, the whole contract was vitiated; and that the plaintiff could recover on no part of it. His lordship, however, observed that the £50 which had been paid, and the £100 now sued for, exactly met the sum of £150, which had been legally ad-

A. being indebted to *B.* for different usurious loans, applies to *B.* for a further advance, which *B.* agrees to make, at the legal rate of interest, provided *A.*'s father will give his security for it, and also for part of the previous debt: *A.*'s father consents, and accepts three bills, the two first of which exactly cover the amount of the legal debt.—The first is paid when due:—In an action on the second;—*Held*, that the acceptances, having been given partly as a security for an illegal debt, were all tainted with the illegality, and were, therefore, void.

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vanted by the plaintiff. A verdict was found for the plaintiff, with liberty to the defendant to move to set it aside, and enter a nonsuit.

The *Solicitor-General*, accordingly, on a former day in this term, moved for a rule *nisi*. He contended that, the acceptances having been given to cover an account which was compounded partly of the legal transaction, and partly of the illegal; the plaintiff could not now say that he would apply this particular security to either debt as he chose, any more than he could have so applied a sum of money:—The contracts having been blended together, he could not separate them. This was to be considered the same as if one bill for £250 had been given. He cited *Maddock v. Hammett (a)*, which was not directly in point, but in which Lord *Kenyon* said that, if a second note were given for a former one, which was usurious, the last was also bad; and that it should not be permitted to a party, who had knowingly received any thing *as interest*, to apply it afterwards to another account, as he should find convenient. A rule *nisi* was accordingly granted, and on this day,

Mr. Serjt. *Best* shewed cause against it. He contended that this security was not avoided by the statute of usury. It had been decided, he said, that where one security was substituted for another, which was usurious, the last security must share the same fate as the first. But that was on the ground that more than legal interest was reserved on the instrument. Here, however, it was impossible that more than £5 *per cent.* could have been reserved on this bill. The statute 12th of *Ann.* stat. 2, c. 16, only enacted “that bonds, &c., *whereupon or* “*whereby* there should be reserved or taken above the

(a) 7 T. R. 184.

"rate of £5 per cent., should be void." The only security, therefore, which was rendered void by that statute, was that which reserved more than £5 per cent. on the face of it, or, by the effect of which, more could be obtained. He admitted that, if, by the contract, it had been intended to give more than legal interest, as if a person were to divide his securities, so as to evade the statute, such securities would be void. There was no doubt but the former transactions between the plaintiff and the younger *Hannel* were tainted with gross usury; but neither by the bill in question, nor by the contract on which it was founded, was it possible that more than 5 per cent. had been reserved. So far from it, this security did not even cover the money which had been advanced. He cited *Barnes v. Hedley (a)*, where the court held that, usurious securities for a loan being destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest was good. He was aware, he said, of the distinction between that case and the present; viz. that there, the promise was to pay the legal debt only; here it was agreed that the acceptances should be applied to the whole account. But if any part of the lawful debt remained unsatisfied, after the payment of the bill in question, it was impossible to say that that bill was usurious. The court, he said, would not carry so penal an act further than the legislature had clearly intended by the terms of it. However usurious the former part of the transaction might be, the court would be inclined, if possible, to follow the example of the court of *Chancery*, and to permit the plaintiff to recover what he was honestly entitled to, and no more. On principles of equity, so much as had been really and *bond fide* lent ought to be

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(a) 2 Taun. 184.

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repaid; and therefore, the court would feel every disposition to relieve the plaintiff from this iniquitous defence. [Lord C. J. *Gibbs*.—This cannot be considered as an iniquitous defence on the part of the father.]

The *Solicitor-General*, *contra*, contended that it was not necessary that the usurious contract should be entered into at the time that the instrument was made; for if a bond, or other instrument, were given to carry into effect an illegal contract, previously entered into, such instrument must be referred back to the time of the original transaction, and must be considered as having been made at that time; if it were otherwise, the statute would be defeated. It had been contended that, because this security did not cover the whole of the legal debt, the plaintiff was entitled to recover upon it:—The securities, however, must stand or fall altogether. Suppose a man were to lend £800, to receive £1000 in payment, and instead of the security of one person, he were to have a bond from two persons for £500 each. In that case, the whole of the money lent would not be covered by either of the bonds; and the lender might recover on one of the bonds, and might then sue upon the other, alleging that he had recovered on the usurious part of the contract, and was now seeking to recover the legal part. [Lord C. J. *Gibbs*.—My brother *Best* admits that that would be usurious, but he argues on the ground that this bill was given at a time subsequent to the usurious contract, and for a part only of the debt.] The *Solicitor General* contended that the three bills were to be considered as one entire bill for £250; for neither of them was appropriated to any specific part of the debt, but they were all given on the general mixed account, and were to go to the reduction of that account. No doubt, but parties, having had usurious connections together, might put an end to them, and enter into legal contracts with each other; and

If the plaintiff had advanced the sum of £150, on condition that the defendant would have given a security for that sum only, there could have been no objection to it. If these bills could be separated, and any one of them applied to the legal demand, why should not the same thing be done, where one sum only had been advanced on a usurious contract? for the lender might, in that case, contend that each of the bills was insufficient to cover the whole debt. [Lord C. J. Gibbs.—I do not think that the insufficiency of each bill to cover the legal debt can make any difference. I should have been very glad to have applied the two first bills to the payment of the sum of £150; but the coincidence was merely accidental.]

Mr. Serjt. *Vaughan*, on the same side, was stopped by the court.

Lord Chief Justice GIBBS.—My brother *Best* has argued this case with great ingenuity, and great candour; for he has not pressed any argument upon the court, which might not be very fairly made use of. The fallacy of his argument is, in supposing the objection to the plaintiff's claim to consist in some illegality in his contract with the defendant; whereas, the difficulty arises from these bills having been given for the purpose of partly covering the debt which had been previously contracted by the defendant's son, on usurious considerations:—It is not that the bills themselves are usurious, but that they were given in furtherance and support of an usurious contract. It is contended for the plaintiff, that he is entitled to support his action on this bill, because it would not cover the whole amount of the legal debt; but I hold that if a person borrow £1000 on usurious interest, and afterwards obtain the security of another person for £800 of it, such security would be void; not because it would be in itself usurious, but because it would have

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been given to support a usurious contract. That is exactly the present case. A large sum was due on a usurious contract, and a smaller sum on a legal contract. As a security for both sums, the plaintiff obtained the defendant's acceptances, expressly applicable to both. Are not these acceptances, then, deposited as a security for the usurious loans? If they were, I conceive that they were void. Suppose there had been no usury in any part of the transaction, and these advances, being unobjectionable, had been satisfied: Is there any doubt, but that the holder of the third bill might have recovered upon it? Then they must apply to the usurious, as well as to the innocent transactions; and, if so, they are avoided unless they can be separated. Though I should have been very glad to have found in the plaintiff a right to recover the sums *bond fide* advanced, yet this bill, having been given to secure usurious loans, is void as if it had been itself usurious.

Mr. Justice *Heath*.—Suppose this security had been given by the son, instead of the father:—There can be no doubt but, in that case, it would have been void. If this be admitted, it would be an evasion of the statute to suffer the plaintiff to recover.

Mr. Justice *Chambre*.—We cannot set aside these securities in part, and let them remain valid for the rest. If a usurious contract be in any way secured by them, they are void *in toto*.

Mr. Justice *Dallas*.—The security is general, and applies indiscriminately to the whole transaction, legal as well as illegal; I am, therefore, of opinion with the rest of the court.

Rule absolute.

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Tuesday,  
Nov. 22.

THORNTON and others v. KEMPSTER.

THE plaintiffs declared that the defendant, on the 31st of December 1812, bargained for and agreed to buy of the plaintiffs, who then and there agreed to sell, 'ten tons of 'sound and merchantable *St. Petersburg* clean hemp *ex Annetta*, at £88 per ton; to be paid for by bills of exchange, not exceeding three months, allowing discount equal to cash in nine months, and fourteen days for delivery:—That in consideration of the premises, and of the plaintiff's promise to deliver the hemp within fourteen days, on being paid for the same as aforesaid, the defendant undertook to receive and pay for the said hemp as aforesaid:—That the plaintiffs, at the expiration of the fourteen days, were ready and willing, and offered to deliver it, but that the defendant refused to receive it, or pay the aforesaid price for the same; whereby the plaintiffs were obliged to resell the said hemp for a sum, less by £100 than the money agreed to be given by the defendant for the same.—The second count was the same as the first, except that it was rather more general.—The third count stated that, in consideration that the plaintiffs had agreed to sell to the defendant ten tons of hemp, for the sum of £847, the defendant undertook to receive the same, and to pay for it by approved bills of exchange to that amount, within the space of fourteen days:—Yet that the defendant would not, within that time, pay for the said hemp in the manner above stated, or otherwise. There were also counts for goods sold and delivered, and the money counts. At the trial of the cause, at the sittings after last *Trinity* term, at *Guildhall*, before Lord C. J. *Gibbs*, it appeared that the contract had been entered into through the medium of a broker, who acted as

*A.* agrees to buy, and *B.* to sell a quantity of " *St. Petersburg* clean hemp," at a certain price, through the medium of a broker, who acts as agent for both parties. The broker delivers a bought note to *A.*, in which, by mistake, he inserts " *Riga Rhine* hemp," instead of " *St. Petersburg* clean hemp;" and then delivers a sale note to *B.* stated correctly, according to the original contract.—*Held*, that the variance between the two notes was fatal, and therefore, that *B.* could not recover in an action against *A.* for not completing the contract.



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agent for both parties:—That he delivered to the defendant the following bought note. ‘Bought for account of Mr. *Thomas Kempster*, from *R. Thornton* and *West*, ten tons sound and merchantable *Riga Rhine* hemp, *ex Annetta*, at £88 per ton, the payment to be in approved bills at three months, allowing discount equal to cash in nine months, and fourteen days for delivery. *London, December 31st, 1812. Roscow* and *Paterson*, brokers.’ In this note, the goods were, by mistake, called ‘*Riga Rhine* hemp,’ instead of ‘*St. Petersburg* clean hemp.’ The broker, having discovered the mistake which he had made in the bought note, handed over the following sale note to the plaintiff, as the real contract of the defendant. ‘*London, Dec. 31, 1812, Mr. T. Kempster. Bought of R. Thornton and West, ten tons St. Petersburg clean hemp £88 . . . £880*  
 ‘Off 34 per cent. discount . . . . . 33.’

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It appeared that *Riga* hemp bore a better price than *St. Petersburg* hemp. The defendant refused to fulfil his part of the contract, and the hemp was, in consequence, resold at a loss of £93.

At the trial, it was objected by Mr. Serjt. *Best*, on the part of the defendant, that the contract varied from the statement of it in the declaration.

The *Solicitor-General* answered that objection, by referring to the third count of the declaration, in which no particular contract was specified.

Mr. Serjt. *Best* then objected, that there was no valid contract between the parties, because there was a variance between the two notes, and therefore the broker, who acted as agent for both parties, had done nothing to bind both parties. He cited *Powell v. Divett* (a), where

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(a) 15 *East*. 29.

the court held that a material alteration in a sale note by the broker, after the bargain made, at the instance of the seller, without the consent of the purchaser, annulled the instrument. The *Chief Justice* refused to nonsuit the plaintiffs, but reserved the point for the consideration of the court. His lordship suggested two questions;—whether, if the defendant had brought his action against the plaintiffs, he could have recovered on this contract; and whether the defendant, under the contract which had been delivered to him, would have been obliged to accept any but “*Riga Rhine* hemp,” which species had never been tendered to him.

Mr. Serjt. *Best* and Mr. Serjt. *Pell* having, on a former day, obtained a rule to shew cause, why the verdict should not be set aside and a nonsuit entered,

Mr. *Solicitor-General* now shewed cause. The third count, he said, put the objection, as to the variance, entirely out of the case. The only question, therefore, was, whether the plaintiffs were entitled to recover on the contract which the defendant, through the medium of his broker, had delivered to them, and by which he had bound himself to take the *St. Petersburg* hemp, which had been tendered to him. He had undertaken to purchase a quantity of hemp, of a certain quality, at a given price; and he had failed in that undertaking. If no note had been delivered to the plaintiffs, and the contract had stood on the entry of it in the broker's book, the question would have turned on that entry; but as the case stood, the contract depended entirely upon the sale note. It was not necessary, he said, that there should have been a counterpart of that contract delivered to the defendant, in order to bind him; for it often happened that a party bound himself to accept goods, when there was no counter-contract, by which the

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other party was bound to deliver them. In order to try this question, it was sufficient to ask, whether the plaintiffs could not have recovered, without giving the defendant notice to produce the note which had been delivered to him, or producing it themselves. The statute of frauds (a), he said, only required that some memorandum or note in writing of the agreement should be signed by the party to be charged therewith, or some person thereto lawfully authorised by him. There was no necessity that the note should be mutually signed by both parties, or that, in the present case, there should have been any note delivered to the defendant.

Lord Chief Justice GIBBS.—This case has nothing to do with the statute of frauds:—The difficulty is in the proof. A contract must be perfect, in order to be binding; that is, there must be a contract on the one side to accept, and on the other to deliver, the same thing. You cannot say that one party is bound to accept what the other party is not bound to deliver. Here, the defendant was bound to accept one species of hemp, and the plaintiffs were bound to deliver another species. These cannot, together, make up one contract. It is an unfortunate case for the plaintiffs, but the objection cannot be got over.

The rest of the court concurred.

Rule absolute.

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(a) 29 Car. 2. c. 3.

1814.

Tuesday,  
Nov. 22.

DOE, on the demise of CHEERE and others, v. SMITH.

THIS was an action of ejectment, brought to recover possession of certain premises situate at *Charing Cross*, and held under an indenture of lease, dated the 30th of *December* 1801, from Sir *William Cheere* to *John Rogers*, for the term of 21 years; which lease contained a proviso for re-entry, on breach of any of the covenants to be performed on behalf of the said *John Rogers*; and also containing, amongst others, a covenant 'that the said *John Rogers*, his executors or administrators, should not, during the said term, grant, demise, let, assign, or set over that indenture of lease, or the premises thereby demised, or grant any under-lease thereof to any person whatever, without the consent of the said Sir *William Cheere*, his heirs or assigns.' In the year 1810, *Rogers*, the lessee, became bankrupt; and the assignees under that commission assigned the premises in question to *John Palmer*, who was the father-in-law of *Rogers*. The latter still kept possession of the premises, and continued to pay the rent to the plaintiffs; and as soon as he had obtained his certificate, *Palmer* reassigned the premises to him. By an agreement, dated the 2nd of *December* 1813, *Rogers* agreed with the defendant *Smith* to let the premises to him for the term of three years, and the present action was brought by the devisees under the will of Sir *William Cheere*, as for a breach of the covenant above stated. *Smith* was only the nominal defendant, being indemnified by *Rogers*, the original lessee. The cause was tried before the *Chief Justice*, at *Westminster*, at the sittings after last *Trinity* term, when the jury found a verdict for the lessors of the plaintiff.

Mr. Serjt. *Best*, on a former day in this term, moved

*A.* grants a lease to *B.*, which contains a covenant that *B.*, his executors or administrators, without mentioning "*assigns*," should not underlet without the consent of the lessor. *B.* becomes bankrupt, and his assignees assign the premises to *C.* *B.* obtains his certificate, and *C.* reassigns the premises to him, after which he underlets them to another person.—*Held* that, *B.* having been discharged at the time of his bankruptcy from all covenants in the lease, by stat. 49 Geo. III. c. 121, s. 19, the under-letting by him, which was in the character of assignee, was no forfeiture of the lease.

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for a rule to shew cause, why the verdict should not be set aside and a nonsuit entered, on the ground that no breach of the covenant had been committed. It was impossible, he said, as the covenant only related to the lessee himself, and did not extend to his assignees, to maintain that the assignment under the bankruptcy was a forfeiture of the lease. He cited *Philpot v. Howe and Robinson* (a), which was the case of a covenant similar to the present, without mentioning "assigns;" Lord Hardwicke there held, that the covenant did not run with the land to the assignee, because assignees were not expressly bound. [Lord Chief Justice Gibbs.—Suppose an action of covenant had been brought against *Rogers*, and the declaration had stated the lease, and the under-letting by *Rogers*, omitting the other circumstances.] That would not alter the event; for in that case, the other circumstances would come before the court on the plea. *Rogers* had committed no breach by becoming bankrupt, for the covenant only applied to a voluntary assignment, and did not extend to an assignment by operation of law. The only question, then, was, as to the under-letting by *Rogers* to the present defendant. He contended that, on the reassignment to *Rogers*, he came in again in the character of assignee, that of lessee having been destroyed by the bankruptcy. This would be extending the doctrine of forfeiture, which the courts, he said, were inclined to restrain as much as possible, beyond what could have been in the contemplation of the parties.—A rule nisi was accordingly granted, and on a subsequent day the Chief Justice mentioned the statute 49 Geo. III. c. 121, s. 19(b), which he considered as putting an end to the question: For as, by that clause, the bankrupt was dis-

(a) 2 Atk. 219, *Saunders's* edit. where the cases on this subject are collected.

(b) By that section it is enacted, 'That where a bankrupt shall

charged from all the covenants contained in the lease, no action could be sustained against him for the breach of them. If the plaintiffs had declared against him as lessee, he would have pleaded his bankruptcy; if as assignee, his lordship considered that the statute would have interfered. However upon this day,

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Mr. Serjt. *Lens* shewed cause against the rule. He admitted that the statute which had been referred to presented a difficulty, which it would be necessary for him, in order to support the verdict, to overcome. The intention of that clause was to relieve the bankrupt from a great hardship, viz. that of being subject to the covenants in the lease, after the estate was no longer in him. The statute, therefore, supposed that the estate was divested out of him. In the present case, therefore, the bankrupt could sustain no such injury as was intended to be provided against by the statute, since the estate had reverted to him, and he now stood exactly in the same situation, as when the lease was first entered into. He was not, he contended, less to be considered as the lessee, because the estate had returned to him through other hands. That was merely an accidental circumstance, and afforded no excuse for the violation of those covenants, to which it was the original intention of the parties that he should be liable. The bankruptcy had not extinguished those covenants, although it had suspended them till the estate reverted to the original lessee. This was merely a covenant in gross from him personally, which did not go to the assignee, but which must bind the original co-

be entitled to any lease, or agreement for a lease, and the assignees shall accept the same, and the benefit therefrom, as part of the bankrupt's estate; the bankrupt shall not be liable to pay the rent accruing due after such acceptance, nor to be in any manner sued by reason of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained.

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venantor, as long as he was in a condition to be bound by it. If the assignees under the commission had assigned to a stranger, he admitted that he would not have been subject to the covenant; but with regard to *Rogers*, it was sufficient that he had got the estate again. He was not charged as assignee, but as the person who had entered into this personal covenant, which neither regarded his character of lessee, or of assignee, and from which he was not released by any thing that had occurred.

Mr. Serjt. *Best*, *contra*, was stopped by the court.

Lord Chief Justice GIBBS.—This was an ejectment, founded on a supposed forfeiture of the lease, by the lessee having assigned it over without the leave of the lessors, and against an express covenant. The facts are, that *Rogers*, the lessee, having become bankrupt, his assignees took to the lease and assigned it to *Palmer*, who afterwards assigned it over to *Rogers*, the original lessee; and it does not appear but that *Rogers*, by means of his friends, may have purchased it:—Lastly, *Rogers* assigns it to the present defendant. If he had actually assigned it while he remained the lessee, there is no doubt but that would have been a breach of the covenant, and the lease would, in consequence, have been forfeited. But this covenant does not extend to assignees, and *Rogers* derives his interest, not from the original lease, but from the assignment to *Palmer*, and he himself stands in the place of an assignee. I should have had some difficulty in deciding the original question, without the intervention of the statute; because, though the covenant could not affect an assignee, *quod* assignee, yet, as *Rogers* did assign over to a third person, I should have doubted whether that would not have been within the terms of the original agreement; even though he himself took as assignee. But there can be no forfeiture, unless there be a breach of covenant; and if the covenant be at an end,

it cannot be broken. The statute, therefore, having put an end to the covenant, there can be no forfeiture. It is very true, as stated by my brother *Lens*, that the covenant could only be broken by *Rogers* being actually in possession of the estate; but the question is, whether, by the extensive words of the nineteenth clause, all the covenants were not put an end to; that being an express discharge of the lessee from all the covenants in the lease, after the assignees had taken it; no action, therefore, could be supported on the lease, after the assignees had so taken it.

Mr. Justice HEATH.—I am of the same opinion. Suppose *Rogers* had not become bankrupt, and had assigned with the consent of the lessors; could it then have been contended that this was a breach of the covenant?

Mr. Justice CHAMBRE.—The statute entirely clears the bankrupt from all responsibility on the covenants, and when he comes into the estate again, he does so in a different character from that of lessee.

Mr. Justice DALLAS concurred.

Rule absolute.

HAMER v. RAYMOND and another.

Tuesday,
Nov. 22.

THIS was an action on the case, and the declaration stated that the plaintiff was lawfully possessed of a certain wharf, situate by the side of, and near to, the river *Thames*, to wit at *Kingston*, in the parish of *St. Saviour Southwark*, in the county of *Surrey* aforesaid; which wharf was then and there supported, protected, and defended by certain posts

'the parish of *St. Saviour Southwark*, in the county of *Surrey*;' though there was no such place as *Kingston* in that parish.—*Held*, that this allegation was to be referred to the venue, and not to the local situation of the wharf; and, therefore, that it was not necessary to prove it to be so situated.

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In an action on the case for damaging the plaintiff's wharf, the declaration stated the wharf to be situate near the river *Thames*, 'to wit, at *Kingston*, in

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or piles, there standing and being:—That the plaintiff was also lawfully possessed of two skiffs, then being in the river, and near the said wharf, to wit at *Kingston* aforesaid, in the parish and county aforesaid:—That the defendants were then also possessed of five barges, then lying in the said river, near the plaintiff's skiffs, to wit, at *Kingston*, &c. aforesaid. Yet the defendants, knowing the premises, but contriving and intending to injure the said wharf, and the piles thereof, and to sink and injure the said skiffs, afterwards, to wit, on, &c. at *Kingston*, &c. aforesaid, wrongfully moored and placed the said barges athwart the sterns of the said skiffs, and so negligently conducted themselves in that behalf, that the ice, then being in the river, drove the said barges with great force against five of the piles and posts of the said wharf, and also against the said skiffs; whereby the said wharf was greatly damaged, and the skiffs were sunk and destroyed.—The defendants pleaded not guilty.

At the trial of the cause, at *Guildford*, at the last assizes for the county of *Surrey*, before Mr. Justice *Heath*, it appeared that the wharf was situated in the parish of *St. Saviour Southwark*, in the county of *Surrey*; and it was thereupon objected by Mr. Serjt. *Best*, on the part of the defendants, that the declaration was wrong in stating it to be at *Kingston*, in the parish of *St. Saviour Southwark*, there being, in fact, no such place as *Kingston* in that parish; and the plaintiff was nonsuited on that objection. It also appeared that, as to the piles, which were stated in the declaration to be supporting and protecting the wharf, they were at the distance of 40 feet from the bank.

Mr. *Solicitor-General*, on a former day in this term, moved for a rule to shew cause, why this nonsuit should not be set aside, and a new trial granted. He contended that, in an action on the case, which, in this particular, differed from an action of trespass, it was not necessary to prove the locality exactly as it was described in the

declaration, particularly where the place was put under a *scilicet*. For the purpose of this action, it would have been immaterial if he had put any other place under a *scilicet*, though without the words ‘*St. Saviour South-work*.’ [Lord C. J. Gibbs. The wharf could only be situated at one place:—When a *scilicet* is applied to a fact, as if a person allege that another spoke words of him, to wit, at *Kingston*, &c. it is immaterial; but when it is applied to the situation of a wharf, or any other place, it is material; and whatever is introduced, must be considered as the description of that place.] Still, the *Solicitor-General* said, it came to the same question, whether it were necessary to describe the exact situation of the wharf. As far as related to the parish, it was correctly stated; the only mistake was in mentioning a place which did not exist in that parish. [Lord C. J. Gibbs.—The plaintiff avers that he is possessed of a wharf, to wit, at *Kingston*, &c.; to what can that allegation be referred, except to the situation of the wharf?] He said it might apply to the venue. He cited the *Mersey Navigation v. Douglas (a)*, which was an action for obstructing the navigation of a river, and the declaration stated that the plaintiffs, to wit, at *Preston*; in the county of *Lancaster*, were proprietors of the free navigation of a certain river *there*, called the *Irwell*. In that case, it was contended that the word *there* must necessarily refer to *Preston*, and that, being a material allegation, though laid under a *scilicet*, it ought to have been proved as laid. The court, however, were of opinion that, though the action was in its nature local, yet it was sufficient to allege the *gravamen* at any place within the body of the county; and that the manner in which it was there stated ought rather to be referred to the venue, than to local description (b). So in

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(a) 2 East. 497.—(b) See *Jeffries v. Duncombe*, 11 East. 226.

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the present case, he contended, it was not necessary that the statement "to wit, at *Kingston, &c.*," should be taken as a description of the actual situation of the wharf.

The court, on the authority of this case, granted a rule nisi, and on this day, Mr. Serjt. *Best* admitted that he could not sustain his objection as to the locality:—But he contended that the piles, which were proved to have been 40 feet from the bank, could not be considered as supporting and protecting the wharf.

Lord Chief Justice GIBBS.—I think that posts or piles, which are put up for the purpose of preventing barges from running against a wharf, must be considered as supporting and protecting it. However, the plaintiff was nonsuited on the ground of the locality, and if he had not been nonsuited, the question would have been left to the jury, whether the piles supported the wharf, or not. I confess, I should have nonsuited the plaintiff on the same ground as my brother *Heath*, but the case which has been cited from 2 *East*, shews that these words may be considered as words of course.—*Per Curiam*,

Rule absolute.

Tuesday,
Nov. 22.

POTTS v. WARD.

Where a cause is referred to arbitration, the death of one of the parties, at any time before the award made, is a revocation of the arbitrator's authority; and the court will set aside an award made subsequently to such death.

IN this action, and in another between the same parties, which came on to be tried at *York*, at the summer assizes 1811, verdicts were taken for the plaintiff, subject to the award of an arbitrator, to whom all matters in dispute between the parties were referred. On the 14th of *February* 1814, at two o'clock in the morning, the plaintiff died, and in the evening of the same day, the arbitrator made his award, by which he awarded that the verdict should stand.

Mr. Serjt. *Best*, in *Easter* term last, obtained a rule nisi to set aside the award, on the ground that the arbitrator's authority was determined by the death of the plaintiff. He made several other objections to different parts of the award, which it became unnecessary to argue.

The *Solicitor General* now shewed cause against the rule. He contended that, as the arbitrator had awarded that the verdicts, which were taken before the death of the plaintiff happened, and which were taken to abide the event of the award, should stand; the award related back to the time when those verdicts were taken. If this award should be set aside, the party would lose the benefit given him by stat. 17 *Car.* II. c. 8 (a).

Lord Chief Justice GIBBS.—I am quite clear that this award cannot stand, because the death of one of the parties is a revocation of the arbitrator's authority. Suppose one of the parties had died immediately after the verdicts had been taken; it might have been contended with the same reason that, in that case, the award ought to stand. The court would be very willing to assist the plaintiff's representatives, but it is impossible that this award can stand.—*Per Curiam*,

Rule absolute (b).

(a) By that statute it is enacted 'That the death of either party, between the verdict and the judgment, shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict.'

(b) In *Turner v. Cooper, Barnes*, 210, a rule was taken by consent to refer it to the prothonotary, to inquire into the quantum of the debt, and the value of the goods levied; and, before the prothonotary made his report, the plaintiff died:—His executor, on his application to stand in the plaintiff's place, was made a party to the rule; and the prothonotary was directed to proceed, without the consent of the defendant to this rule.

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Thursday,
Nov. 24.

WRIGHT v. FLAMANK, clerk.

The incumbent of two livings, *A.* and *B.*, obtains a licence from his bishop to reside out of the parish of *A.*, there being no parsonage house therein, on condition of his residing at a short distance, and actually performing the duties:—

Held, that this is not such a residence at *A.* as to excuse him from residing at *B.*, without another licence for that purpose.

THE defendant in this action, which was brought to recover the amount of certain penalties, incurred under stat. 43 Geo. 3. c. 84 (*a*), against non-residence, was in the possession of four livings; viz. the royal donative of *Lanbydroc*, and the prebend of *Herredum Marnays*, in the county of *Cornwall*, and diocese of *Exeter*; and the rectory of *Glympton*, and that of *Oddington*, in the county and diocese of *Oxford*. The action, as to the two former livings, was, on application to one of the judges of this

(*a*) By the 12th section it is enacted, 'That every spiritual person, being possessed of any archdeaconry, deanery, or any other dignity, &c., who shall, without sufficient cause, or without such licence, or exemption, as is in this act mentioned, wilfully absent himself therefrom, for the space of three months, and not exceeding six months, in any one year; and shall reside at any other place, except at some other dignity, &c. of which he may be possessed, shall forfeit one-third of the annual value;—if for six months, and not exceeding eight months, one-half of such annual value;—if for more than eight months, two-thirds of such annual value;—if for a whole year, three-fourths of such annual value.'

The 19th section enacts, 'That any bishop may grant licences of absence, in his discretion, to any spiritual person, in the following cases; viz. where he is prevented from residing by illness, &c.;—or if there be no fit house of residence on the living, or if such spiritual person reside in any mansion belonging to any other benefice in his possession;—or if such spiritual person have any benefice, &c. of small value, and serve as curate elsewhere, and provide for the serving of such his benefice, &c.;—or if he be master or usher of any endowed school, or master or preacher of hospitals, &c., or serving as preacher in any proprietary chapel, &c.'

The 20th section enacts, 'That it shall be lawful for the bishop, in any case not enumerated in the foregoing section, if he shall think it expedient, to grant to any spiritual person, possessed of any dignity, &c., a licence to reside out of the parish, and to assign a fit salary to the curate who shall be employed to do the duty:—Provided, that the circumstances of such case, and the reasons for granting such licence, shall be forthwith transmitted to the archbishop of the province, who shall examine into such case, and shall thereupon allow or disallow such licence; and no such licence shall be good, unless so allowed by such archbishop.'

court, discontinued, on the terms prescribed by stat. 54 Geo. 3. c. 54. s. 4 (a).

Mr. Serjt. *Lens*, on a former day in this term, obtained a rule to shew cause why this action, as to the rectories of *Glympton* and *Oddington*, should not also be discontinued. The ground on which the defendant claimed an exemption as to *Glympton*, was a certificate by the bishop of *Oxford*, stating 'that the bishop would have granted the defendant a licence for non-residence on *Glympton*, for

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(a) The 54 Geo. 3. c. 54, enacts, 'That all licences for non-residence, which shall have been granted, or which shall be granted on or before the 1st of July 1814, by any archbishop or bishop, under and subject to the provisions of the 43 Geo. 3. c. 84, and upon which the archbishop or bishop granting the same, shall certify that they are satisfied, and believe that the causes of granting such licences really have existed for many periods antecedent to the granting thereof, and that the archbishop or bishop, giving such certificates, would have granted the licences to which they refer, if proper application had been made to him in due time, and that the conditions, upon which such licences would have been granted, have been performed;—and also all certificates, which shall certify that the archbishop or bishop, giving such certificates, would have granted licences for the periods specified in such certificates, for causes of a temporary nature, to be also therein specified, and which they believe did really exist, if proper application had been made; and that the conditions have been performed:—shall be deemed to be good and valid licences, as if duly granted according to the 43 Geo. 3. c. 84.'

By the 4th section it is enacted, 'That it shall be lawful for any person, against whom any action shall have been brought, before the 6th of December 1813, for any penalty incurred under the 43 Geo. 3. c. 84, and to whom any such licence and certificate shall have been granted, or who shall have notified his exemption before the 1st of July 1814, to apply to the court, or a judge thereof, if the court be not sitting, for an order to discontinue such action, upon payment of the costs up to the time of such application, to be taxed as between attorney and client; and such court or judge is authorized, upon affidavit of the granting and registering of any such licence and certificate, or of the notification of any exemption, and of notice thereof, with a copy of the licence, &c. having been given to the plaintiff, to make such order as aforesaid; upon the making of which order, and on payment of costs, such action shall be discontinued; and it shall be lawful for the plaintiff, at any time after the 20th July 1814, till such application be made, to proceed in such action, as if this act had not been passed, and as if no licence or certificate had been granted, or notification made.'

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' the period of his absence from that benefice, if application had been made in due time for the same; on account of his having the royal donative of *Lanbydroc*, in the county of *Cornwall*, which is locally situated in the diocese of *Exeter*;—of his actually performing the duties of that parish himself;—of his having applied for a licence from the bishop of *Exeter* to reside at *Bodmin*, three miles distant from *Lanbydroc*, there being no parsonage-house in the parish;—and of his having the duties of the parish of *Glympton* regularly and properly performed, during his absence.'—The question was, whether this licence to reside at *Bodmin* were, or were not, to be considered as a residence at *Lanbydroc*, for the purpose of excusing his non-residence at *Glympton*.

Mr. Serjt. *Copley* now shewed cause against the rule.—The object, he said, of stat. 54 *Geo.* 3. c. 54, was to protect parties who had neglected to obtain licences, though previously entitled to them:—The bishop might, in such case, grant a certificate with a retrospective operation; subject, however, to the provisions of the 43 *Geo.* 3. c. 84; for he contended that the certificate must, in its construction and form, be similar to the licence granted under the last-mentioned act. All, therefore, that it was necessary for him to shew was, that the ground of the defendant's certificate would not have been a sufficient exemption under the 43 *Geo.* 3. In the 19th section of that act, the cases were enumerated, in which the bishop was empowered to grant licences; but the certificate in question could not be said to fall within any of those cases. By the 20th section, the bishop was also authorized to grant licences in cases which were not enumerated by the 19th clause; but the licence, in such case, must be approved of by the archbishop, which was not the case in the present instance. The defendant was liable to penalties for not residing on his living, unless he resided at

some other; now, in fact, he resided on neither, but gave as an excuse for not residing on one, a licence not to reside on the other. According to that, a man might have twenty livings, and a licence not to reside upon one would be an excuse for not residing on any of the others. So, in such case, though, by the stamp act, it would be requisite for him to have as many stamped licences as he had livings, by these means, one licence and one stamp would be sufficient. He should say nothing at present as to *Oddington*, because the question as to that would be decided, in a great measure, by the decision of the court as to *Glympton*.

Mr. Serjt. *Lens*, *contra*, observed that the certificate of the bishop of *Oxford* was to be considered with reference to the licence of the bishop of *Exeter*, recited therein; which, he contended, was not to be taken as a licence to be absent from *Lanbydroc*, but only as substituting for that parish, the place which was most convenient for the residence of the defendant. The defendant was to do the duty of *Lanbydroc*, though corporally residing at *Bodmin*. It was physically impossible for him actually to reside at *Lanbydroc*, but he contended that this was a residence there, sufficient for all the purposes of the act.

Lord Chief Justice GIBBS.—The question in this case is, whether the bishop of *Oxford* were authorized to grant the certificate which excuses the defendant's residence at *Glympton*, without the confirmation of the archbishop; and that depends on the question, whether the residence of the defendant at *Bodmin*, which certainly is made an excuse, by the licence, for his non-residence at *Lanbydroc*, be equivalent to a residence at the latter place, and so puts him in the same situation, as if he had been corporally resident at *Lanbydroc*. To decide this question, we must look to the 12th section of 43 Geo. 3. c. 84

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That section subjects the incumbent to the penalties imposed thereby, if he do not reside on his living, or on some other, of which he may be possessed. Now, in the present case, the defendant does not reside at *Glympton*; *prima facie*, therefore, he is liable to the penalties of the act; and he can only be excused from those penalties, by shewing that he is resident on some other living. He contends that, though he be not actually resident at *Lanbydroc*, yet the bishop having permitted him to reside at *Bodmin*, that permission excuses him not only from a residence at *Lanbydroc*, but also at every other living, of which he may be possessed. That proposition, however, is not true to its full extent:—As far as he can be called upon to reside at *Lanbydroc*, it is sufficient, but no further; and if he were desirous to excuse himself for not residing at another living, he should have resorted to the method prescribed by the act; that is, he should have obtained a licence for absence from that living. This he has not done; I am therefore of opinion that he is not excused.

The rest of the court concurred.

Rule discharged.

Friday,
Nov. 25.

WRIGHT v. LAMB, clerk.

Where a licence for non-residence has been obtained, previously to the 14th July 1814, pursuant to 54 Geo. 3. c. 54, but the allowance by the archbishop, required by 43 Geo. 3. c. 84. s. 20, is not obtained till after that period;—the licence, when ratified, is valid from the time when it was originally granted.

THIS was also an action for non-residence, the defendant being possessed of the rectory of *Charwelton*, in the diocese of *Peterborough*, and the vicarage of *Banbury*, in the diocese of *Oxford*. With respect to *Charwelton*, the defendant had obtained a certificate from the bishop of *Peterborough*, dated the 10th of June 1814, sanctioning his absence from that benefice, 'on account of there being no house of residence thereon, and of his serving

'the cure.' As to *Banbury*, the bishop of *Oxford* had also granted him a certificate, dated the 29d of *June* 1814, 'on account of his having the benefice of *Charwelton*;—of his residing at *Daventry*, within four miles of 'the same, by a licence of his diocesan;—and of his performing, himself, the duty of *Charwelton*.' The defendant, in *July* last, applied to Mr. Justice *Heath*, under the 4th section of 54 *Geo. 3. c. 54 (a)*, for an order to discontinue this action, by virtue of these licences; when it was objected on the part of the^a plaintiff that, as to *Banbury*, the bishop of *Oxford* had no authority to grant a licence for non-residence on that living, without the confirmation of the archbishop; the cause alleged in that licence not being one of those enumerated in the 19th section of 43 *Geo. 3. c. 84 (b)*:—And the learned judge, considering the objection to be well founded, refused the application (c). The defendant afterwards applied to the archbishop, who ratified the licence on the 8th of *November*.

Mr. Serjt. *Blosset*, accordingly, on a former day in this term, obtained a rule to shew cause why the action should not be discontinued, on payment of costs.

Mr. Serjt. *Copley* now shewed cause. The question, he said, was, whether the certificate, as to *Banbury*, could be considered as a good and valid licence, on or before the 1st of *July* 1814, which was the time limited by the 54 *Geo. III. c. 54*. It was true that a licence had been granted by the bishop, antecedently to that period; but that was ineffectual, unless ratified by the archbishop. Now the licence did not receive the confirmation of the archbishop, till long after that time. It was impossible, he said, to illustrate this case by any example;—it was

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(a) *Vid. ante*, p. 369, note (a).—(b) *Ante*, 368, note (a).

(c) See the last case.

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sufficient to look at the concluding words of the 20th section of 43 Geo. III. c. 84. 'And no such licence shall be good, unless so allowed by such archbishop.'

Mr. Serjt. *Blosset*, *contra*, contended that the licence, when ratified by the archbishop, had a retrospective operation to the time when it was originally granted, and was therefore valid from that time. By stat. 43 Geo. III. c. 84, the bishop was empowered, in the first instance, to grant his licence;—when he had so exercised his authority, the archbishop was to enquire into the circumstances of the case, and was to allow or disallow such licence at his discretion:—The word *disallow*, he said, supposed a pre-existence of the licence. The licence was to be invalid, *unless* so allowed; not *until* it was so allowed; it was, therefore, a condition subsequent. So, in the case of the enrolment of a bargain, the bargain was void *unless* enrolled, not *till* it was enrolled. All that was required by the 54 Geo. III. c. 54, had been done, for that act took no notice of the confirmation by the archbishop. It was only necessary to satisfy the court that, by this matter *ex post facto*, authority had been given to a licence which was granted before the 1st of July 1814. When the application was made to Mr. Justice *Heath*, the licence had not been submitted to the archbishop; therefore, *rebus existentibus*, it was not a valid licence:—but after it had been submitted to the archbishop, and had received his sanction, it was valid *ab initio*; otherwise, it would be a licence granted entirely by the archbishop. Surely the archbishop must have some time allowed him for making his enquiries; and if a defendant, during that time, were to be constantly subject to an action for non-residence, he would be placed in a degree of peril, which never could have been intended by the legislature. The 43 Geo. III. c. 84, was a penal act, and ought not to be construed strictly.

Lord Chief Justice GIBBS.—The object of the 54 Geo. III. c. 54, was to relieve from the penalties of non-residence, those clergymen who were entitled to an excuse for such non-residence, and who might have obtained dispensations for such penalties, if they had pursued the course directed by the legislature ;—that is, provided, within a certain time, they had procured licences from the bishop, with certificates added to such licences, stating that the bishop would have granted such dispensations, if applications had been made to him for that purpose ; which, if granted, would have furnished them with a legal defence. It is objected, in the present case, that the licence has not been rendered effectual by something which is required by the act to give it validity ;—that the mere licence of the bishop is not sufficient, unless it be confirmed by the archbishop, within the time limited by the act. To decide this question, we must consider the construction of the act ; and if that only require the licence to be obtained within the limited time, and to be afterwards confirmed by the archbishop, the licence in the present case is sufficient. The 54 Geo. III. c. 54, speaks only of the licence or certificate, and of the time within which they are to be obtained ; it limits no time to any further proceedings. If, then, the licence have been obtained in time, though the allowance by the archbishop were not procured till a later period, that is sufficient. If the allowance had *never* been procured, the defendant could never have availed himself of the licence. When, therefore, the application was made to my brother *Heath*, he was quite right in rejecting it, because the allowance had not then been obtained. Now, however, it has been obtained ; and therefore, all that is required to be done, has been done.

The rest of the court concurred.

Rule absolute.

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 Saturday,  
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LUZALETTI v. POWELL.

On moving for a rule *nisi* to compel the plaintiff to give security for costs, the defendant must state in what stage the proceedings are:—The court will not grant the rule *nisi*, in a cause in which interlocutory judgment has been signed, until that judgment has been set aside.

THE *Solicitor-General*, on a former day, moved for a rule *nisi* to compel the plaintiff in this action, and in another between the same parties, to give security for costs, on the ground that he had left this country, and was gone to reside in *Spain*; and that his attorney, on being applied to, refused to give any security (a). He was not prepared to say in what stage of the proceedings the causes then stood, conceiving it to be sufficient to shew that, when cause should be shewn against his rule. The court, however, held that it was necessary to state it on making the motion, which the *Solicitor-General*, accordingly, now did; when it appeared that interlocutory judgment had been signed in one of the actions, but that, in the other, the defendant had not pleaded. With respect to the first, he admitted that the court could not make the rule absolute, pending the judgment; but his reason for making the motion now was, that the other side might not allege that the application had not been made soon enough.

Lord Chief Justice GIBBS.—The court cannot even grant a rule *nisi*, unless the judgment be set aside. This is the same as if the motion were made in a cause which does not exist.

*Per Curiam*—Rule refused, as to the action in which interlocutory judgment had been signed. As to that in which no plea had been pleaded, a rule *nisi* was granted.

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(a) Where the defendant is entitled to demand security for costs, he should first apply for it to the plaintiff's attorney; 2 *Smith's Rep.* 661; and if the motion be not made till after notice of trial, the court of *K. B.* will require an affidavit that such application has been made; otherwise, not.—*R. E.* 47 *Geo. III.* *K. B.*—*Tidd's Prac.* 533, 5th edition.

## EDWARDS V. HODDING.

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THIS was an action for money had and received, and was brought to recover back the sum of £1000, which had been paid by the plaintiff, as a deposit on the purchase of an estate in the county of *Wilts*. The defendant acted as attorney and auctioneer for the vendors of the estate in question, which was knocked down to the plaintiff at a public auction, on the 8th of *March* 1813; one of the conditions of sale being, that abstracts of the title should be delivered within one month from the day of the sale. This condition not being complied with, the plaintiff's attorney, after frequent correspondence with the defendant on the subject, at length wrote to him on the 21st of *March* 1814, as follows:—'Sir;—For want of a title, you will please to return our client his deposit-money with interest.'—The defendant, on the 23d of *March*, answered this demand, by stating that he was directed by the vendors to inform the plaintiff that they were proceeding with the title to the estate, and that they would not consent either to return the deposit, or to let the plaintiff off his purchase. At the trial of the cause, before Mr. Justice *Dampier*, at the last assizes at *Salisbury*, it was contended, on the part of the defendant, that the action was not sustainable against him, as auctioneer, because he had paid the money over to his principals, as appeared by his answer to the plaintiff's letter. The learned judge, however, was of opinion that the plaintiff was entitled to break off the contract, and that the defendant should not have paid over the money, knowing, as he must have known, having acted as attorney as well as auctioneer for the vendors, that the

An auctioneer, receiving money as a deposit on the sale of an estate by auction, knowing that there is a defect in the vendor's title, is answerable to the purchaser for the deposit, though he should have paid it over to the vendor.

*Semb*; that he is a mere stakeholder, and not to be considered as agent for both parties; and that he is liable, at all events, till the contract be completed.

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latter were unable to make a good title to the estate. The jury, accordingly, found a verdict for the plaintiff.

Mr. Serjt. *Lens*, on a former day in this term, moved that this verdict should be set aside, and a new trial granted. He contended that this action could only be supported, on the ground that the money was remaining in the agent's hands, and that he had received notice not to pay it over. He cited Lady *Windsor's* case (a), which was an action for money had and received, and was brought to recover certain sums which the defendant, as receiver of Lady *Windsor's* rents, had received from the plaintiff, and which the plaintiff conceived she was not entitled to. The court held, that the action should have been brought against Lady *Windsor* herself, and not against her agent; and Lord *Mansfield* said that, where payments were made to a *known agent*, the action should be against the principal, except in special cases; as under notice, or *mala fide*. The present case, he said, did not fall within either of the exceptions made by Lord *Mansfield*, because the money had been paid over before notice. [Lord Chief Justice *Gibbs*.—The person to whom the plaintiff would first apply, was the auctioneer:—Now his answer certainly leaves it doubtful whether the money had been paid over or not.] If there were any doubt, the strict law, he said, ought to prevail. In the case of *Buller v. Harrison* (b), which was not, however, exactly in point, Lord *Mansfield* stated the law to be clear that, if an agent paid over money which had been paid to him by mistake, he had done no wrong, and the plaintiff must call upon the principal. This was a recognition of the doctrine for which he was contending, though applied to another instance. [Lord Chief Justice *Gibbs*.—

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(a) 4 Bur. 1984.—(b) Cowp. 565.

No doubt, that principle is correct in the case of a common agent, but has it ever been decided that an auctioneer is at liberty to pay over the money immediately? It is not paid to him for the use of the principal, but it is placed in his hands as a deposit, to be paid over, when his principal shall have made out a good title. What situation would the purchaser be in, if this were otherwise? He goes to the auctioneer, as to a solvent person, often without knowing who is the vendor, on the faith that a good title will be made; and if the auctioneer might pay over the deposit immediately, great fraud would be practised.] An auctioneer, he contended, was agent for both parties, though in different capacities. [Lord Chief Justice *Gibbs*.—He is rather in the nature of a stakeholder. If I send my servant to transact business for me, he does not become the agent of the other party. Indeed I think that calling the auctioneer the agent of both parties is begging the question.] A rule *nisi* was however granted, and on this day,

Mr. Serjt. *Best* shewed cause against it. There was no doubt, he said, as to the plaintiff's right to recover back the deposit; the only question was, whether the action had been properly brought against the auctioneer. The plaintiff would have had great difficulty to support his action against any other person. The defendant, being the attorney for the vendors, must have known of the defects in their title, and it was at least, therefore, extremely imprudent to pay over the deposit, with the knowledge that such defects existed. It might fairly be presumed, from the defendant's letter, that the money was still in his hands; for if he had paid it over, he ought to have informed the plaintiff to whom he had so paid it, in order that the action might have been brought against him. He cited *Burrough v. Skinner* (a), where

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(a) 5 Bur. 2639.



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the defendant, as auctioneer, had sold to the plaintiff an interest in land, for which the plaintiff paid him a deposit of £50; but on an objection to the title, the plaintiff declined going on with the contract, and demanded back the deposit. The auctioneer refused to refund it, but on an action being brought, paid £8 into court. The plaintiff obtained a verdict, and on cause being shewn against the defendant's rule for a new trial, the court were clear that the action lay against the auctioneer. The money did not appear, in that case, to have been paid over; but if it had, they held that the auctioneer was a stakeholder, a mere depository of the £50, and ought not to have parted with it, till the sale was completed, and it appeared to whom it belonged. On the authority of that case, therefore, the defendant was liable, whether he had paid the money over, or not:—For he had no right to pay it over, till he could do so with safety; that is, till he knew whether a good title could be made out. Independently, however, of this authority, it would be a most injurious principle, that, where a person paid money to an auctioneer, who privately paid it over to his principal, the auctioneer should not be liable to the person from whom he received it.

Mr. Serjt. *Leas*, *contra*, admitted that he felt the force of the case cited by the other side; but it was not, he said, exactly in point, because *there*, the demand was made before the money was paid over; and though the court held that the auctioneer was liable, whether the money were paid over or not, yet the substance of that case would be unimpeached, though the court, in the present instance, should decide in favour of the defendant. There had been no concealment on the part of the defendant: If there had, or if he had wilfully withheld the money from the plaintiff, after notice not to pay it to any other, he would have been liable; but he had paid it over

in pursuance of the duty of his trust.—This was a question of great importance to auctioneers :—If an auctioneer were to be considered as a stakeholder, there was an end of the question ; but he still insisted that he was the agent, *diverso intuitu*, of both parties.

Lord Chief Justice GIBBS.—The only question in this case is, whether the defendant have placed himself out of the reach of this action, by having paid over the money to his principals.—It is not contended that the plaintiff is not entitled to recover back his deposit ; but the defendant insists that, having paid it over to the vendors, and having received no notice to the contrary, he is not answerable for it. My brother *Dampier* thought otherwise ; he considered that the defendant, as the attorney for the vendors, must have been aware of the defect in their title, and should not have paid over the money, while that defect existed ; and therefore, that he was liable.—On that ground, I am of opinion that this action may be maintained. It is unnecessary, (though I am by no means prepared to say that the doctrine laid down in *Burroughs v. Skinner* is not to be carried to its farthest extent) to consider how the case would have stood, if the defendant had not known of the defect in the title :—For he was clothed in the twofold character of attorney and auctioneer. It is quite clear, therefore, that he did know that the title was disputable, at least in the view which the purchaser had of it ; and it is equally clear that, having that knowledge, he ought not to have paid it over. The money, therefore, was paid in his own wrong, and he is, consequently, answerable for the return of it, as his principal would have been.

Mr. Justice HEATH.—I am of the same opinion. There would have been no doubt in this case, if notice had been given to the defendant not to pay over the money ;

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and his knowledge of the defective title was tantamount to notice.

Mr. Justice CHAMBER.—I think my brother *Dampier's* directions were perfectly correct. This was not an absolute, but a conditional payment, or rather a deposit; and should not have been paid over to the vendors, till the conditions were complied with. The defendant, by paying it over before, has made himself liable.

Mr. Justice DALLAS.—Without saying what an auctioneer ought to have done in a common case, I am clearly of opinion, confining myself to the present case, that the defendant ought not to have paid over the deposit.

Rule discharged.

Saturday,  
Nov. 26.

DUNBAR v. HITCHCOCK.

Where a defendant is entitled to treble costs by a judge's certificate, under a statute, and the judgment is entered up for treble costs generally, without stating on what ground the defendant is entitled to them;—this is a substantial defect, and the court will not amend the judgment by striking out the word "treble."

THIS was an action for an assault and false imprisonment, and was tried at the sittings after *Trinity* term 1813, when a verdict was found for the defendant; and it appearing that this was a case within the mutiny act, the judge certified that the defendant was entitled to treble costs, according to that statute (a). In *Michaelmas* term following, the costs were taxed as for treble costs, and judgment was entered up for the same upon the roll ge-

(a) By the annual mutiny act, (Sect. 168 of stat. 47 Geo. 3. c. 39.) it is enacted, 'That if any action, &c. be brought against any person, for any act, matter, or thing, done in pursuance of this act, the defendant may plead the general issue, and give the special matter in evidence;—and if a verdict pass for the defendant, or the plaintiff be nonsuited, or suffer any discontinuance of the action, the judge shall allow the defendant his treble costs, &c.'

nerally, without stating how they were recovered under the statute. The plaintiff afterwards brought a writ of error in the house of Lords, assigning for error, among other things, 'that it did not appear by the said judgment, why or for what reason it was considered by the court that the defendant should recover the said sum, for his treble costs and charges by him in that behalf sustained, according to the form of the statute in that case made and provided, by the said court adjudged.'—The defendant then took out a summons before Mr. Justice Heath, to shew cause why the judgment should not be amended; but the learned judge refused the application, on the ground that the error was substance, and not misprision.

Mr. Serjt. *Levis*, on a former day in this term, having obtained a rule *nisi* to strike out the word 'treble' in the judgment,

Mr. Serjt. *Pell* now shewed cause against it. There was no part of the record, he said, which entitled the defendant to treble costs; the question, therefore, simply was, whether this were a mere mistake and inadvertency of the clerk, which the court would amend, by virtue of the statutes of amendment (a);—and this, he said, must depend on the construction of those statutes, and not on any general decision at common law;—or whether this had not been done by the defendant intentionally, in order to entitle him to his treble costs, according to the certificate. In *Tidd's* Precedents, p. 393, 4th edition, there was a form of a judgment entitling the defendant, a commissioner of the property tax, to treble costs, which was exactly in point. The defendant should have drawn up his judgment according to that form, and so have en-

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(a) *Vid. ante*, p. 180, note (b).

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titled himself to treble costs; instead of which, having made this gross mistake, he now wanted to waive his right to treble costs. But when a party applied to a superior court to amend a judgment, which was not amendable by the roll, it was necessary, he said, that that application should be supported by affidavit; though, where the error might be amended by the roll, there was no necessity for such collateral assistance. If the court should grant this amendment, it would be an encouragement to mistakes of every kind, which might always be amended by calling them misprisions.—In *Green v. Rennett* (a), Mr. Justice Buller made an express distinction between amending those mistakes which were occasioned by the act of the parties, and those which were occasioned by the mistake of the clerk.

Mr. Serjt. *Leas*, *contra*, insisted that this was merely a misprision which the court would allow to be amended; and that amendment would obviate the necessity of an argument in the court above. The defendant had the judge's certificate, and there was no necessity that the amount of the costs should appear at all on the record, any more than the costs of a special jury, or costs of any other description. [Mr. Justice Heath.—Can the court award treble costs in any action, at their discretion?—] [Lord Chief Justice Gibbs.—The allegation is not true that these are the costs which the defendant has sustained by this action, as stated in the judgment:—The sum claimed consists of those costs, and something more.] This, he contended, was merely a mode of reckoning the costs, which, in fact, were what the statute allowed him to claim. The case would have been very different, if the defendant had attempted to take them without the au-

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(a) 1 T. R. 782.

thority of the judge's certificate. [The *Chief Justice* enquired what was to govern the prothonotary in taxing double or treble costs, in a case where there was no certificate of the judge? Mr. Prothonotary *Ray* said that the same proof was required, as would satisfy the court, if the cause were before them, that the party was entitled to them.] Mr. Serjt. *Lens* then cited *Harper v. Carr* (a), to shew that the defendant was entitled to his treble costs, by the certificate of the judge alone, without any interference by the court; and *Finlay v. Seaton* (b), to shew that it was not necessary that the ground on which he was entitled to them should appear upon the record.

Lord Chief Justice GIBBS.—But those cases relate to the *authority* on which the costs are taxed, and not to the *manner* in which they are to appear on the record. Under the impression of the information which we have at present, as to the mode of drawing up the judgment, I am of opinion that this rule cannot be made absolute. In the case of a common judgment, where the defendant succeeds in the action, the judgment is, that the defendant do recover against the plaintiff a certain sum, being the costs incurred by him in defending the action, and these are supposed to be the full costs. Where a statute gives double or treble costs, it gives, in fact, a recompense for the injury which the defendant has sustained by the action, consisting of the costs incurred by the defence, together with certain aliquot parts of those costs. They ought not, therefore, to be stated in the common form, but something ought to be added, to justify the recovery of them. No case has been cited, where the courts have held double or treble costs to have been included in the costs given by the judgment generally for the defendant. This, therefore, is a sub-

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(a) 7 T. R. 448.—(b) 1 Taun. 210.

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stantial defect, and cannot be considered as a misprision of the clerk; and, consequently, the court cannot order it to be amended as such.

The rest of the court concurred.

Rule discharged.

Monday,  
Nov. 28.

— v. MELLER.

Bail by affidavit rejected, on the ground that one of them was described in the notice of justification as *A. B.* generally, but in the affidavit of justification as *A. B. the younger*.

Mr. Serjt. *Bosanquet* opposed the justification of the bail in this case, which was by affidavit, on the ground that notice had been given that *J. S.* would justify; the affidavit which had been sent up from the country stated that *J. S. the younger* was worth so much. By stating him in the notice generally, the plaintiff would be induced to suppose that the elder person was intended as one of the bail, and he might, perhaps, consider *him* to be sufficient.

Mr. Serjt. *Best* contended that the plaintiff should have produced an affidavit that there were two persons of the same name.

Lord Chief Justice GIBBS.—The defendant has, by his affidavit, confessed that there are two. For, by designating this man as the younger, it must be implied that there is another of the same name; which other must be the person intended in the notice, since, in the notice, he is stated generally.—*Per Curiam*,

Bail rejected.

WYNN V. KAY.

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THIS was an action on the non-residence act, 43 *Geo. 3. c. 84 (a)*, and was brought to recover certain penalties, alleged to have been incurred in the years 1812 and 1813.

Mr. Serjt. *Heywood*, on a former day in this term, obtained a rule, founded on the 54 *Geo. 3. c. 54 (b)*, to shew cause why the action should not be discontinued, on the ground that the licence, which had been granted by the bishop to the defendant, though it did not cover the whole of the time which the defendant was alleged to have been absent from his benefice; yet left only two months in any one year, which was too short a period to sustain the action. A licence had been granted on the 16th of *November* 1813; to be absent from that time till the 1st of *January* 1815, on account of the unfitness of the parsonage house, with a certificate, dated and registered on the 18th of *November* 1814, that the cause of action existed, and that a licence would have been granted, if application had been made, from the 21st of *February* 1812, to the 16th of *November* 1813; so that the only part of the time, during which the plaintiff claimed penalties, and the defendant remained unprotected by the licence, was from the 1st of *January* to the 21st of *February* 1812.

Mr. Serjt. *Copley* now shewed cause against the rule. He made a preliminary objection, that, though the licence was obtained previously to the 1st of *July* 1814, the certificate, which was to give the licence a retrospective operation, was not granted till the 18th of *November* following;

Though a licence for non-residence do not cover the whole of the period for which penalties are sought to be recovered, yet, if there be not sufficient time left uncovered, to subject the incumbent to a penalty, the court will interfere to stay the proceedings.—The stat. 54 *Geo. 3. c. 54*, which requires licences to be granted on or before the 1st *July* 1814, does not limit the time within which certificates are to be granted.—*Semble*, that a certificate, granted after the 1st *July* 1814, cannot be pleaded in bar to the action; but is only available by application to the court to stay the proceedings.

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(a) See that act recited, *ante* p. 368, note (a).—(b) *Ante* 369, note (a).



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and therefore, that the case did not fall within the 54 *Geo. 3*, which, he contended, limited the certificate, as well as the licence. The certificate, he said, was all that the bishop, in the present instance, had to consider, as excusing the defendant's absence, during the period for which it was granted; and therefore, it was not like the case of the confirmation or allowance by the archbishop, which, as the court had lately decided, was not limited by the 54 *Geo. 3* (a). As to the other question, whether the court would discontinue the action, on the ground that there was not sufficient time left uncovered by the licence to entitle the plaintiff to a penalty; he said they were not then trying, whether the plaintiff were entitled to any penalties; but whether the court would interfere, in this instance, to stop the proceedings. He would assume that the defendant had a licence for all but two months, which he might plead in bar to the action. [Lord C. J. Gibbs.—Is that so? Would the defendant be able to avail himself, at the trial, of a licence or certificate granted subsequently to the 14th of July, 1814, as he might in the case of a notification of exemption, made previously to that time? The 54 *Geo. 3*. allows the defendant, when he has obtained this retrospective certificate, to apply to the court to stay the proceedings, but it does not say that he can avail himself of it *by plea*.] That, Mr. Serjt. Copley said, was an important point, and depended on the question, whether a licence, with the retrospective certificate, were to have exactly the same operation, as a licence granted previously to the 14th of July. If it were; it might be pleaded in bar to the action. From the first section of the 54 *Geo. 3*, it might, perhaps, be supposed that such was the intention of the act;—but towards the end of the 4th section, it was said ‘that it

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(a) See *Wright v. Lamb*, ante p. 372.

'should be lawful for the plaintiff to proceed, until application should be made, as if the act had not passed, and 'no licence, &c. had been granted.' Now it would be quite nugatory to let the plaintiff proceed, if the licence and certificate might be put upon the record, and pleaded in bar; and on the other hand, it would be absurd for the defendant to apply to the court, on payment of costs, if he could set this up as a defence, and so leave the plaintiff to proceed at his peril.—With regard, however, to the present application, he contended that the rule could not be made absolute on the ground on which it had been moved; for the licence, at all events, was no answer to two months of the time. If the plaintiff had brought his action for two months only, the declaration would have been bad, and the defendant might have demurred; but he could not apply to the court to interfere in this summary way:—The plaintiff might proceed at his peril. [Lord C. J. Gibbs.—Then we will stay your proceedings, as to all but two months. If the licence overreach so much as to leave the plaintiff without a cause of action, the court may certainly interfere.]

Mr. Serjt. Heywood, in answer to the preliminary objection made by the other side, observed that there were only two places in the 54 Geo. 3, in which the limitation of the 1st of July 1814 was mentioned;—one was in the first section, and related only to the granting of the licences; the other was in the fourth section, as to the time when the notifications of exemption were to be registered. It was clear, he said, that the certificate was not to be contemporaneous with the licence, because the bishop was to certify upon licences, which *have been* granted before the 1st of July 1814. The reason was, that a person, having obtained a licence previously to that time, and wishing to have it continued, might have this certificate with a retrospective operation.

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It appeared that the legislature meant to give a permanency to the provisions of the 43 *Geo. 3. c. 84*, and to allow the bishop to grant these retrospective licences at any time. The plaintiff, he said, was calling upon the court to put the same construction upon a remedial act, as upon one in which they were tied down to the strict letter.—He was stopped by the court from arguing as to the two months.—With regard to the question, whether the defendant might avail himself of this licence and certificate at the trial, it was not necessary, he said, for him to discuss that point on the present occasion.

Lord Chief Justice GIBBS.—The stat. 54 *Geo. 3* is not very accurately worded, but I think that the limitation of the 1st of *July* 1814 can only apply to the licences, and not to the certificates. The circumstance of the certificate being granted by the same person as the licence, occasioned me, at first, some doubt; but the act speaks not only of licences granted before the 1st of *July*, but of those which were granted before the act; ‘all licences ‘which shall have been granted, or which shall be granted ‘on or before the 1st of *July* 1814, on which the bishop ‘shall certify;’ not on which he *shall have* certified before the 1st of *July*. It is evident, therefore, that licences granted before the 1st of *July* 1814 are put on the same footing as those which were granted before the act passed; and that there is no restriction as to the certificates. My brother *Copley* very properly relied on the words of the 4th section, and certainly, if they were applicable to the licences, they would also be applicable to the certificates; but if we look at the words immediately preceding the 1st of *July* 1814, we shall see that that limitation is only applicable to the notification of exemption; and if the legislature did not originally intend the certificates to be so limited, the court will not permit it to be done by a side wind.—It is an important question, whether a certificate, granted after

the 1st of *July*, may be pleaded in bar to the action. If it might, it would be a strong reason for requiring the certificate as well as the licence to be granted before that time; because, otherwise, the defendant might lead the plaintiff to suppose that he had no defence, and obtain his certificate the day before the trial, and so get all his costs; whereas the court, when application is made to them to discontinue the action, will take care that the defendant shall not take this unfair advantage. I do not think, therefore, that the legislature intended that these certificates should be pleaded in bar to the action.

Mr. Justice HEATH.—I am of the same opinion as to the limitation of the 1st of *July*. The grammatical construction is with the defendant. According to my brother *Copley's* argument, the passage in the 4th section of the 54 Geo. 3, 'or who shall have notified his exemption before the 1st of *July*,' should have been in the copulative, instead of the disjunctive;—it should have been *and* instead of *or*.

Mr. Justice CHAMBER.—The defendant has till the 1st of *July* to obtain his licence; suppose it be not obtained till the last moment, how would the bishop be able to amend it by the certificate, which is the very object of the certificate? That alone would decide the point:—The certificate would be useless, if it were limited as to time.

Mr. Justice DALLAS concurred.

Rule absolute.

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DELAFIELD v. TANNER.

Monday,  
Nov. 28.

MR. Serjt. *Vaughan* shewed cause against a rule, obtained by Mr. Serjt. *Copley*, to set aside the interlocutory judgment of merits, though it be the defendant's intention to plead his infancy. The court will set aside a regular interlocutory judgment, on affidavit.

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ment, which had been signed in this action as for want of a plea. The ground on which he resisted the rule was, that, though the defendant had sworn to merits, his intention was to plead his infancy.

Lord Chief Justice GIBBS.—This may be a very good plea, and I see no objection to the judgment being set aside, on payment of costs.—*Per Curiam*,

Rule absolute (a).

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(a) In *Forbes v. Lord Middleton*, Str. 1242, Mic. 19 Geo. 2, B.R., the court held that a regular judgment was never to be set aside, except the defendant pleaded to merits; and in *Willet v. Atterton*, 1 Black. 35, Trin. 22 Geo. 2, the court refused to set aside the judgment, on the ground that the defendant meant to plead the statute of limitations. But in *Maddox v. Holmes*, 1 B. & P. 330, this court held that the statute of limitations was not, necessarily, an unconscientious plea, and set aside a regular judgment, without restricting the defendant from pleading it: And in *Evans v. Gill*, *ibid.* 52, the court made the same decision, in the case of the defendant pleading a *bond fide* bankruptcy.

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Monday,  
 Nov. 28.

GIBSON v. COPEMAN.

In an action for work and labour, the defendants, having offered by letter to pay a certain sum for the debt, with the costs up to that time, which was refused by the plaintiff, obtained a rule to shew cause why the sum of £5. and the costs should not be paid into court, and further proceedings

Mr. Serjt. *Leas*, on a former day, obtained a rule, calling on the plaintiff to shew cause, why the defendant should not be at liberty to pay the sum of £5. into court, in this cause, together with the costs of the action up to the 10th of May last, and why all further proceedings should not be stayed, if the plaintiff would accept of that sum, in full satisfaction of his demand; and why the plaintiff should not pay to the defendant his costs incurred subsequently to the 10th of May, and the costs of this application; and why, if the plaintiff should refuse to accept of that sum, the said £5. should not be paid into court, and why the plaintiff should not pay the costs incurred since the tender; and why, if the plaintiff refused to accept it, the £5. should not be paid into court, and struck out of the declaration.—The court discharged the rule, it appearing that there was nothing oppressive in the plaintiff's conduct.

court, and be struck out of the declaration. It appeared that this was an action for work and labour;—that the *copias* was issued on the 20th of *April*, returnable on the 18th of *May*;—that on the 10th of *May*, the defendant's attorney wrote to the plaintiff's attorney, stating that he had called upon him, for the purpose of tendering him £5. for the debt, and to pay the costs up to that time; and that he was then ready to remit the same, upon hearing from him. On the 20th of *May*, he received a letter from the plaintiff's attorney, stating that the plaintiff refused to take less than £12, exclusive of the costs, and desiring to hear again from him upon the subject. On the 30th of the same month, the defendant's attorney again wrote to the plaintiff's attorney, to say that £5. were as much as was due, but offering to refer it. The declaration was filed on the 28th of *June*.—The rule was granted on the authority of *Zeevln v. Cotwell* (a), and *Roberts v. Lambert* (b).

Mr. Serjt. *Bosanquet* now shewed cause against the rule. The object of the cases in 2 *Taunt.* he said, was to prevent the plaintiff from converting the declaration into an engine of oppression; for the ground on which the rule in *Zeevln v. Cotwell* was supported was, that it was a common practice for the plaintiff to refuse the debt and costs, though the defendant had offered to discharge the demand. He would not attempt to impeach the doctrine laid down in that case, nor to shorten the arm of the court:—But in the present case, there was nothing like vexations on the part of the plaintiff, and with regard to the sum tendered, it was evident that the action was not brought for a specific sum, since the defendant had offered to refer it. The only case, in which this question had come before the consideration of the court of *King's*

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GIBSON  
v.  
COPMAN.

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(a) 2 *Taunt.* 203.—(b) *Ibid.* 283.

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*Benob*, was that of *Burmester v. Hilch* (a), in which the cases from 2 *Taunt.* were cited, but the court, so far from recognizing the practice, as then existing, refused to adopt it, as being novel and inconvenient. One objection to this practice was, that it would give a defendant all the advantage of a regular tender, by merely sending a letter by the post. If the defendant pleaded a tender, he must shew a moral certainty that, if the plaintiff had chosen to put his hand upon the money, he might have taken it; whereas, by these means, a defendant might relieve himself, by making an offer which, if accepted, he would probably have refused to execute. Though the court, therefore, would adopt this course, whenever any oppression was intended, they would not be inclined to make it their general practice,

Lord Chief Justice GIBBS.—I do not think that this is a case in which the court will interfere. There is a great deal of weight in the argument of my brother *Bosanquet*, that this would not have been a good tender; and it would be highly inconvenient to allow these loose offers to operate as tenders made in the regular way. [Mr. Serjt. *Lens* here observed, that the same strictness was not required in these offers, as in tenders, as appeared from the cases in 2 *Taunt.*] But in those cases, the offer might have amounted to a regular tender; and besides, there are circumstances in the present case, which shew that no vexation or oppression was intended on the part of the plaintiff,

The rest of the court concurred, and the rule was discharged, but without costs.

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(a) 13 *East*. 551.

1814.

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Nov. 28.

WOOD, and others, v. THOMSON.

THE defendant in this action had purchased a quantity of furniture of the plaintiffs, and then went abroad, leaving the goods in the hands of an auctioneer, with directions to sell them, and remit the proceeds to her. The plaintiffs, however, attached the money in the hands of the auctioneer, in the mayor's court, for the sum of £111. 3s. 7d. The defendant returned, and surrendered herself to the prison of the mayor's court, to dissolve the attachment, and then pleaded in abatement, that the debt was not incurred within the jurisdiction of that court. The plaintiffs then entered a *nolle prosequi* in that action, but sued a writ of *capias ad respondendum* out of this court, directed to the sheriffs of London, for the above sum of £111. 3s. 7d., and a detainer was thereupon lodged against the defendant in the prison of the mayor's court.

*A.* proceeds by foreign attachment against *B.*, who surrenders, and pleads to the jurisdiction of the court. *A.* discontinues the foreign attachment, and arrests *B.* by process out of this court:—*Held*, that the foreign attachment was not such an arrest as to entitle *B.* to be discharged out of custody in the present suit, on entering a common appearance.

Mr. Serjt. *Lens*, on a former day in this term, obtained a rule to shew cause, why the defendant should not be discharged out of the custody of the sheriffs of London, on the ground that, after an attachment in the mayor's court, the defendant could not be held to bail on process issuing out of another court, for the same cause of action.

The *Solicitor-General*, on a subsequent day, shewed cause against this rule. He admitted that, generally speaking, the courts would not suffer a person to be arrested twice for the same cause of action; but there were many cases, he said, in which the courts would not discharge a defendant on the second arrest. In *Salisbury v. Whiteall (a)*, where the defendant, being one of two

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(a) *Hil. 43 Geo. 3.* cited *Tidd's Prac.* 211. 5th ed.



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partners, was arrested for a joint debt, and pleaded the partnership in abatement, the court of *King's Bench* held that the plaintiff might, after entering a *cassetur bill*, bring a new action against both partners, and arrest the defendant again for the same debt. [Lord Chief Justice GIBBS.—But there, the second arrest was not vexatious, for the plaintiff was not aware of the existence of the partnership :—The plaintiffs in the present case should have known that it did not fall within the jurisdiction of the mayor's court.] But that misapprehension, he contended, did not make the arrest vexatious. It was no reason that, because the plaintiffs had mistaken the jurisdiction of the court, the defendant should not be arrested again. The plea was set up by the defendant himself, as in the case cited; whereas, instead of pleading to the jurisdiction of the court, he might have tried the validity of the debt. In *Bates v. Barry* (a), where the plaintiff had innocently misconceived his cause of action, and on discovering his mistake, had discontinued it and commenced another, the court had refused to discharge the defendant out of custody on the second arrest. That, he said, was a stronger case than the present, because there, the defendant had actually been arrested twice;—in the present case, the defendant was not arrested in the first action, though the proceedings against her goods were for the purpose of compelling her to appear, and put in bail. So in *Harris v. Roberts* (b), which was a second action on the same bond, the plaintiff having been nonsuited in the former action, for not proving the execution, the court discharged the rule for entering a common appearance. In that case, he said, there must have been two arrests, though it did not distinctly appear

(a) 2 Wils. 381.—(b) Barnes 73.

1814.

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 Thomson.

in the report; because, if the defendant had not been arrested in the former action, there would have been no ground for the application. [Lord Chief Justice GIBBS. —But in that case, the defendant did not deny the execution of the bond.] So in the present case, the defendant did not attempt to deny the existence of the debt.—He then cited a case of *Bremley v. Peck* (a), which was in all respects similar to the present, except that there, the defendant put in bail to dissolve the attachment in the mayor's court, instead of surrendering herself, as in the present case; and the plaintiff, finding that the garnishee was not to receive the proceeds of the goods, withdrew the writ of attachment, and paid the costs. Mr. Bolland obtained a rule *nisi* to discharge the defendant out of custody, on filing common bail, and on cause being shewn by Mr. Adolphus, the court of King's Bench discharged the rule with costs; observing that the attachment in the mayor's court was not such a holding to bail as could be considered vexatious.—The two cases, the *Solicitor-General* contended, could not be distinguished from each other; for the principle was, that a defendant should not be arrested twice for the same cause of action; and it was the same thing, he said, whether he were arrested and carried to prison, or put in bail. Nor did the payment of the costs by the plaintiff, in the case of *Bremley v. Peck*, make any distinction; because, in the present case, the defendant, by pleading in abatement, was precluded from recovering her costs.

Mr. Serjt. *Lens*, *contra*, observed that the present case did not fall within the principle of the cases which had been cited by the *Solicitor-General*. It was neither a mistake arising from the honest misconception of the plaintiff, as in the case of *Bates v. Barry*, nor from the

(a) *Easter*, 53 Geo. 3. K. B. MS.

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failure of evidence in proving the execution of a bond, as in that of *Harris v. Roberts*.—It was a most improper use to make of the mayor's court, to hold out the terror of a foreign attachment in order to get possession of the defendant's goods, when the plaintiff knew that that court had no jurisdiction; for the plaintiff had not stated that, at the time when he attached the goods, he believed the case to be within the jurisdiction. [Lord Chief Justice GIBBS.—I have no doubt but that you have taken the true distinction. In the cases cited, the plaintiff proceeded by mistake;—in the present case, there appears to have been no mistake.]

The court, however, took time to enquire into the circumstances of the case of *Bromley v. Peck*, which the *Solicitor General*, at the time of the argument, was unable to state accurately to the court.—On this day, the *Chief Justice* stated the facts of that case. His lordship observed, that it was not a good reason for discontinuing the action in the mayor's court, that the plaintiff had no expectation of obtaining his debt from the garnishee; the object of that suit being to compel an appearance, which object had been answered. The court of *King's Bench*, however, had thought fit to decide that the proceedings in the court below were not to be considered as a vexatious arrest; and as there was no material distinction between the two cases, the rule must be

Discharged, without costs.

WALKER v. HAWKEY.

1814.

Monday,
Nov. 28.

Mr. Serjt. Copley shewed cause against a rule, which had been obtained by Mr. Serjt. Best, to set aside the proceedings in this cause for irregularity, on the ground that the *capias* was made returnable on a day certain, instead of a general return day. In *Perrot v. Hele* (a), this court agreed that no advantage could be taken of irregularity of process, without having it returned, so that it might be before the court. But at all events on the authority of *Bourchier v. Whittle* (b), and *Davis v. Owen* (c), he contended that the service only should be set aside, and that the writ might be amended.

Mr. Serjt. Best, *contra*, said that the practice always was, to make these motions before the writ was returned. As to amending it, there was no rule before the court for that purpose; the rule was to set aside the proceedings for irregularity, and the writ, he contended, was a mere nullity, unless it were made returnable on a day on which, by the practice of the court, writs might be returned. He cited *Inman v. Huish* (d), as an express authority to shew that the writ was irregular, and that the court would not amend it.

The court, however, on the authority of *Reubel v. Preston* (e), where the return of the writ was wrong, but the plaintiff had leave to amend it,

Allowed the amendment, on payment of costs.

(a) 3 Wils. 58. See also *Carty v. Ashley*, *ibid.* 454.

(b) 1 H. B. 291.—(c) 1 B. & P. 342.

(d) 2 New Rep. 133. But there, the amendment was refused, because the bail would have been affected by it.—See the argument in that case.

(e) 5 East. 291.

C A S E S

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

IN

HILARY TERM,

IN THE

FIFTY-FIFTH YEAR OF THE REIGN OF GEORGE III.

1815.

Monday,
Jan. 23.

PRINCE v. NICHOLSON, executor of NICHOLSON.

MR. *Solicitor-General* moved for a rule to shew cause, why the plaintiff's demurrer to the defendant's plea *puis darrein continuance* should not be set aside, and why the plaintiff should not be at liberty to reply, by confessing the several allegations contained in the plea, and taking judgment of assets *quando acciderint*. The judgment of the court on the demurrer was delivered in favour of the defendant in *Trinity* term last (a); but as it was not given on the day when the case was argued, the plaintiff was not apprized of it, and for that reason had not made this application at an earlier period.

Where judgment has been given for the defendant on demurrer to a plea, the court will not, in a subsequent term, set aside that judgment, and suffer the plaintiff to reply, by confessing the matters contained in the plea, and taking judgment of assets *quando acciderint*.

Lord Chief Justice GIBBS.—How can we amend a judgment after the term in which it was delivered? I gave judgment in this case at full length; it must, therefore, have been notorious that judgment was given. This is so extraordinary an application, to set aside a judgment which has been entered up two terms back, and in an action, too, against an executor, where the rights of third persons may be affected, that, at least, the plaintiff should find a case where the court has permitted such a judgment to be set aside (b).

Rule refused.

(a) *Vid. ante*, p. 280.—(b) See 4 Bur. 1988.

1815.

Tuesday,
Jan. 24.

PHILLIPS v. CHAMPION.

An insurance on the freight of a ship, destined for a fishing adventure, in the *South Seas*, is not determined by the arrival of part of the cargo in another ship.

THIS was an action on a policy of insurance, effected on the freight of the ship *Active*, at and from *London* to the southern whale and seal fishery, and was tried before Lord Chief Justice *Gibbs*, at the sittings after last *Michaelmas* term, at *Guildhall*, when the ship was proved to have been lost in the *South Seas*. It appeared, however, that before the loss happened, upwards of 800 seal skins, in a damaged state, were consigned from the ship, by means of another vessel, and actually arrived in this country. The jury found a verdict for the plaintiff.

Mr. Serjt. *Lens* now moved that this verdict should be set aside, and a new trial granted. The general merits of the case, he said, were out of the question; but the ground on which he made this motion was, that the policy, not being for any fixed duration of time, had terminated when the seal skins arrived in this country; for he contended that when any part of the cargo, which is the produce of the voyage insured, is sent home, that is the termination of the risk.

Lord Chief Justice *GIBBS*.—This is a mere fancy of the imagination. If a single seal had been caught, on the ship's arrival in the *South Seas*, and had been sent home by another ship, the underwriters might as well contend that that would have been a termination of the voyage. In the present case, however, the skins were sent home on account of their damaged state; so that, though I am of opinion that, on general grounds, this defence would fail, the defendants are not entitled to avail themselves of it.—*Per Curiam*,

Rule refused.

1815.

Tuesday,
Jan. 24.

DAND V. BARNES.

Mr. Serjt. *Rough* shewed cause against a rule, which had been obtained by Mr. Serjt. *Best*, to set aside the service of the writ of *capias ad respondendum* in this cause for irregularity, on the ground that the year of our Lord, in the notice at the foot of the writ, was in figures. After the decision of the court, in the case of *Rogan v. Lee* (a), he would not attempt to contend that the year, if inserted at all, must not be inserted at full length; but another question was, whether this application ought not to have been made earlier. It appeared that the writ issued on the 29th of *June* last, and was returnable on the 3d of *November* (the morrow of *All Souls*); and that the motion was not made till the 26th of *November*, being the last day of *Michaelmas* term. He cited *Pearson v. Hodgson* (b), which was the case of an irregularity of the same nature as the present; the *latuit* was returnable on the 6th of *November*, and the motion was made on the 18th; so that, in that case, there was less delay than in the present instance; the court of *King's Bench*, however, held that the defendant had come too late.—Another objection was, that the defendant was not entitled to make this application at all; for his affidavit was entitled in a wrong cause, viz. in *Dand v. Barnes*; whereas the action was brought against *Barnes*, together with three others, as appeared by the notice at the foot of the *capias*. On the authority of 1 *Smith's Rep.* 457, 2 *T. R.* 643, and 7 *T. R.* 661, he contended that the affidavit, being so entitled, was not in a condition to be read.

A defendant may move to set aside the service of a writ for irregularity, at any time before a new step is taken in the cause.—Where common process is sued out against *A.* and several others; *A.* may move the court, if the others be not brought into court, upon an affidavit, entitled of a cause between the plaintiff and *A.* only.

(a) *Ante* 272.—(b) *Mic. 55 Geo. III. K. B. MS.*

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DAND
v.
BARNES.

Mr. Serjt. *Best*, as to the latter objection, contended that, in the case of common process, he had a right to assume that the action was against one only, until the plaintiff had brought the others into court; for the plaintiff might declare against each of them separately, though in the case of bailable process, he could not, as was decided in *Jonge v. Murray (a)*.—As to the other objection, that the defendant was too late in his application, he said the practice of this court was, that the defendant might make this motion at any time before another step had been taken.

The court were of opinion, that under the circumstances of the case, the defendant's affidavit was properly entitled, and that his application was made in proper time. The rule was therefore made

Absolute.

(a) *Anle 274.*

Tuesday,
Jan. 24.

RINGER v. JOYCE.

Where an arbitrator, having, by mutual agreement of the parties, closed his examination, refuses the application of the defendant's attorney for another hearing, and makes his award; the court will not set aside the award, on the affidavit of the defendant's attorney, that he is in possession of evidence which would repel that, on which the award was founded.

Mr. Serjt. *Best* had obtained a rule, calling on the plaintiff to shew cause, why the award of the arbitrator, to whom this cause had been referred, should not be set aside. The action was brought for work and labour, and was referred to the arbitration of a gentleman at the bar, before whom the parties met at three different times. The third meeting, it was agreed, should be the last, when all the evidence on both sides was to be produced. At that meeting, the plaintiff laid certain accounts before the arbitrator, on which the award was founded. The

defendant's attorney afterwards applied to the arbitrator for another hearing, alleging, generally, that he was in possession of fresh evidence, which would counterbalance the effect of the accounts produced by the plaintiff. The arbitrator, however, refused the application, on the ground that he could not, with regularity or propriety, comply with it. The present motion was made on the affidavit of the defendant's attorney, which stated that he was not aware of the nature of the accounts which had been produced, and that he had evidence sufficient to outweigh them.

Mr. Serjt. *Vaughan* was to have shewn cause, but the court called upon Mr. Serjt. *Best* to support his rule.—He said that, if arbitrators might reject evidence thus offered to them, the chief object of references would be frustrated; that object being, that the arbitrator might investigate facts, which the court and jury had not time to do at *nisi prius*. It was common, he said, for the judge at *nisi prius* to call up a witness and examine him, after the counsel had closed his case; and there were many things which it would be dangerous to lay before a jury, which might, with perfect safety, be submitted to a barrister of eminence and discretion, as the arbitrator in the present instance was. The arbitrator, however, had conceived that he had no authority to receive this fresh evidence, but he contended that he ought to have an opportunity of reconsidering his award.

Lord Chief Justice GIBBS.—I am by no means of opinion that the arbitrator in this case has made any mistake. Every case of this kind must stand on its own ground, and the arbitrator must use his own discretion, whether he will grant another hearing or not. In the present case, it was agreed that the third meeting should be the last, and at that meeting there was nothing said respecting any fresh evidence:—If any such existed, it

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should have been explicitly stated to the arbitrator, as a reason for deviating from the regular course. The arbitrator's answer to the application was, that he could not with propriety comply with it; and as he was to judge for himself, I think that, on that ground, he was fully justified. But the case is defective in another point; for the defendant's attorney states that, by this new evidence, the effect of the plaintiff's accounts would be destroyed. Now he could only know that from the defendant, and therefore, before we set aside this award, we should, at all events, have required an affidavit of the defendant himself.—
Per Curiam,

Rule discharged with costs.

Tuesday,
Jan. 24.

CLUTTERBUCK v. BRABANT, deforciant.

A mistake having been made in the concord of a fine, in the number of messuages to be conveyed, the writ of covenant is altered in conformity to it, but is afterwards restored to its original form:—
The court will not amend the concord by the writ of covenant so altered, but leave the party to his remedy by a new caption, or by re-acknowledging the concord.

MR. Serjt. *Vaughan* moved that the chirographer might be permitted to amend the concord of this fine, by changing 'four messuages' to *five*, according to the writ of covenant.—It appeared that the writ of covenant had been sued out for five messuages, but this mistake having been made in the concord, the writ of covenant was made conformable to it, on the supposition that the error was in that part of the instrument, and not in the concord;—that the cursitor, on discovering the mistake, restored the writ of covenant to its original form; but the chirographer not considering himself justified in amending the concord without the authority of the court, the present application was made; on the supposition that the court would direct the amendment, as of a mere clerical mistake.
Lord Chief Justice GIBBS.—This is an extraordinary

mistake: The parties have taken on themselves to amend these proceedings, without knowing where the error lay, and now desire us to amend the concord by the writ of covenant, thus altered and re-altered and amended. By so doing, we should be sending this mistake into the title, and it might be a very awkward circumstance hereafter;—we might perhaps be not amending an error, but altering the agreement of the parties. The material question, however, is, whether it be in our power to alter the concord:—This may all be set right by having a new caption, and the parties will not, by adopting that method, lose their writ of covenant.

The learned Serjeant, accordingly, took nothing by his motion, but adopted the course suggested by the Chief Justice. He afterwards, however, moved that the concord might be re-acknowledged in court, instead of having a new caption, which was granted.

1815.

CLUTTERBUCK
v.
BRABANT,
deforciant.

HURD v. GIRDLESTONE.

THIS was an action of covenant, brought to recover the arrears of an annuity of £152:2s, which had been granted to the plaintiff by *W. A. Madocks*, for the sum of £900, and of which the defendant had, by his covenant, guaranteed the payment. The defendant, by his pleas, alleged that part of the consideration money for the said annuity, viz. the sum of £3:15s:10d. was paid back to the plaintiff, on pretence of a charge or demand for searches for incumbrances on the estate or property of the said *W. A. Madocks*, when in truth no such searches had ever been made, contrary to the form of the statute (a), whereby the an-

Wednesday,
January 25.

A., an attorney, purchases an annuity of *B.*, and having paid the consideration money, receives from *B.* the amount of a bill for business done, including, by mistake, a charge for searches for incumbrances, which searches had never been made.—*Held* that the payment of this charge, so inadvertently made, was not a return of the consideration money, within the meaning of 17 Geo. III. c. 26. s. 4.

(a) By stat. 17 Geo. III. c. 26, s. 4, it is enacted, 'That if any part of the consideration money be returned to the person ad-

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GIRDLESTONE.

nuity was void. At the trial of the cause, at the sittings after last *Michaelmas* term, at *Guildhall*, before Lord Chief Justice *Gibbs*, it appeared that the defendant had acted as attorney for *Madocks*; that after he had paid him the sum of £900, being the consideration money for the annuity, he received from *Madocks* the amount of his bill for business done for him as attorney, one of the items of which was, 'searches for incumbrances £3:15s:10d.' which searches, it appeared, had never been made. The Chief Justice left it to the jury to say, whether this charge had been made inadvertently, or whether it had been made for the purpose of getting back part of the consideration money: If the overcharge had been made through inadvertence or mistake, his Lordship considered that, however improper such an error might be, it was not a case within the act.—The jury found a verdict for the plaintiff.

Mr. Serjt. *Lens* now moved that this verdict should be set aside, and a new trial granted, or a nonsuit entered, on the ground that the overcharge in the plaintiff's bill was an attempt to recover back part of the consideration money, and therefore that the annuity was within the meaning of the act, the object of which was to protect parties granting annuities, whether in the case of fraud, or of inadvertency. The only case, he said, which was at all similar to the present, was that of *Broomhead v. Byre* (a), where the court of *King's Bench* ordered the annuity deeds to be cancelled on two grounds; first, that

'vancing it, or if the consideration, or any part of it, be paid in notes, which, with the privity and consent of the person advancing them, shall not be paid when due; or if the consideration, or any part of it, be paid in goods; or if any part of the consideration be retained on any pretence;—the grantor of the annuity may apply to the court to stay proceedings on the judgment or action, and the court may order the deed, &c. to be cancelled.'

(a) 5 T. R. 597.

the attorney, who was the real grantee of the annuity, had charged commission on the advance of his own money; and *secondly*, that some of the charges in his bill for making the deeds, &c. were unreasonable and improper.

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HURD
v.
GIRDLESTONE.

Lord Chief Justice GIBBS.—The doctrine for which the defendant contends is, that there should be no stipulation to retain any part of the consideration money, so that a larger sum should be represented on the memorial than is really paid; and that is perfectly true; for if £100 appear on the memorial to have been paid, and £20 of it be retained or paid back, in fact only £80 would be paid. The defendant however, contends further, that if an attorney purchase an annuity of another person, and having paid the whole consideration money, deliver a bill in which there are some charges which are not sustainable, the annuity is void by this act, even though the overcharge have been made by mistake, and acceded to by the other party. I cannot subscribe to this doctrine, or think that this is a case within the act. If this had been done for the purpose of fraudulently paying less than was to appear on the memorial, no doubt the transaction would have been illegal, and I left it to the jury to say whether this were so or not.

Mr. Justice HEATH.—I am of the same opinion. In the case cited, the court had to decide on the fact; here, on the contrary, the jury have decided it, and have found that there was no fraudulent intention on the part of the plaintiff.

Mr. Justice CHAMBERE.—The intention of the act was to guard the grantees of annuities against imposition, but it never was intended to deprive a person of his property for a mere mistake. This was a strong case to go to a jury, but they have decided that there was no imposition.

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v.

GIRDLESTONE.

Mr. Justice DALLAS.—The intention of the act was to guard against fraud only, and the jury have excluded the supposition of fraud, by finding that this was an inadvertency.

Rule refused.

Wednesday,
January 25.

HOLME v. SMITH.

The court will not grant an attachment against a witness, for not appearing to give evidence, unless a clear case of contempt be made out against him.—Where the witness resides 24 miles from the assize town, and his expenses are not tendered to him till the evening before the trial, the court will not grant an attachment.

Mr. Serjt. *Pell* shewed cause against a rule, which had been obtained by Mr. Serjt. *Best*, for an attachment of contempt against *Daniel Knight*, for not attending to give evidence on the trial of this cause, at the last assizes at *Winchester*, pursuant to his subpoena. It appeared that the residence of the witness was twenty-four miles from *Winchester*;—that the subpoena was served on the 13th of *July*;—that the plaintiff, on the 19th of *July*, being the day before the cause was expected to be tried, tendered him £1 for his expenses, which the witness refused;—and that in the evening of the same day, the plaintiff tendered him the sum of £3 for his expenses. The court, he said, would not grant an attachment, unless all necessary expenses had been tendered at the time when the subpoena was served (a).


Mr. Serjt. *Best*, *contra*, observed that the sum tendered was quite sufficient to defray all reasonable expenses; and that, if this attachment were not granted, witnesses would be encouraged to make a bargain for their expenses, so as to enable them to make a profit of their evidence.

Lord Chief Justice GIBBS.—This would be a very good

(a) He cited *Fuller v. Prentice*, 1 H. B. 49;—*Bowles v. Johnson*, 1 Bl. 36;—and *Hallet v. Mears*, 13 East. 16.

argument to a jury, in an action against a witness, but before we can grant an attachment, we must have a very clear case of contempt made out against him. The question is, not whether those, whose testimony is wanted at the trial of a cause, shall be permitted to extort money from the parties, but whether a case have been made out against the witness, sufficiently clear to induce the court to grant an attachment against him. I do not think that it is absolutely necessary to tender sufficient conduct money, at the time of serving the subpoena; because, in some cases, a party may at first tender an insufficient sum, and on that being refused may increase his offer. I am far from thinking, however, that, in the present case, the plaintiff has brought himself within the rules which the court requires. The subpoena was served a week before the trial, and it is not pretended that any adequate offer was made till the evening before the trial. If the plaintiff have any real ground of complaint,—if he have lost any thing by the absence of this witness, he has his remedy by bringing an action on the case against him (*a*), but to that remedy he must be left.—*Per Curiam*,

Rule discharged (*b*).

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 HOLME
 v.
 SMITH.

(*a*) Given by stat. 5 *Eliz. c. 9. s. 12*, for the penalty of 10*l.* and further recompense, if assessed by the court. ——— (*b*) *Vid. ante*, p. 42.

1813.

Thursday,
January 26.

WILKS v. ATKINSON.

In an action for not delivering goods according to agreement, after demand made, it is not necessary to adduce evidence in support of the averment, that the plaintiff was ready and willing to accept and pay for the goods.—

Where a man agrees to sell a quantity of oil, he not having at the time the oil ready made, but only the raw materials for making it;—

Held, that this is a contract for the sale of goods, wares, and merchandize, within the exemption of the stamp act.

THIS action was brought for not delivering a quantity of linseed oil, according to agreement, and the declaration stated, 'That the plaintiff, on the 1st of *December* 1813, at the request of the defendant, bargained for and bought of the defendant 30 tons of linseed oil, on the terms therein stated, to be delivered in two months: In consideration of which, and that the plaintiff had undertaken to accept and pay for the same, the defendant undertook to deliver it:—That the plaintiff, on the 25th *January* 1814, requested the defendant to deliver it; but that, *though the plaintiff was always ready and willing to accept it, and pay for the same, on the terms agreed upon*, yet the defendant would not deliver it, whereby, &c.'—The cause was tried before Lord Chief Justice *Gibbs*, at *Guildhall*, at the sittings after last *Michaelmas* term, when the plaintiff proved the contract, and a demand, on his part, of the oil in question; but it was objected, on the part of the defendant, that the plaintiff should have adduced evidence to shew that, at the time of the demand, he was ready and willing to pay for the oil, according to his averment in the declaration to that effect; and in support of that objection, the case of *Rawson v. Johnson* (a) was cited, where Lord *Kenyon* held that, under this averment, it was necessary for the plaintiff to prove that he was prepared to tender and pay the money, if the defendant had been ready to deliver the goods.—Another objection was that, as the defendant was only a *crusher* or maker of the oil, and did not keep the oil ready crushed for sale, the contract was executory on his part, and

(a) 1 *East*. 203.

therefore, that the agreement ought to have been stamped, The Chief Justice, however, refused to nonsuit the plaintiff, who accordingly obtained a verdict.

Mr. Serjt. *Lens* now moved that the verdict should be set aside, and a nonsuit entered; and with respect to the first objection, he relied on the case of *Rawson v. Johnson*, above cited. As to the second point, he contended that it was necessary that all agreements should be stamped, except such as fell within the exemptions of the stamp act (*a*), which this case, he said, did not.

Lord Chief Justice GIBBS.—My opinion at the trial was, that the delivery of the oil, and the payment for it, were to be concomitant acts; and that it was not necessary for the plaintiff to prove that he had offered the money to the defendant, till the defendant was ready to perform his part of the contract, by delivering the oil. By the demand which he made on the defendant, he proved himself to be ready and willing to pay for the oil, when delivered.—With respect to the second objection, that the agreement ought to have been stamped, the facts are, that the defendant, having a stock of oil, not in the state of oil, but in seed, entered into this agreement, upon which, and not till then, the oil was prepared for delivery; and this is the way in which persons in this business always conduct it. It might as well be argued that the agreement of a baker to deliver bread ought to be stamped, because, at the time of the agreement, the flour has not been converted into bread:—or that of a butcher who contracts to deliver meat, when perhaps the beasts are not killed. It would be an outrage, upon common sense, to say that this was not a contract for the sale of goods, wares, or merchandize.

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WILKS

v,

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(a) 48 Geo. III. c. 149. Schedule: Part 1. tit. Agreement. One of the exemptions is, 'Memorandum, letter, or agreement, made for or relating to the sale of any goods, wares, or merchandize.'

1815.

WILKS

v.

ATKINSON.

The rest of the court were unanimously of this opinion,
and the rule was, accordingly,

Refused.

Thursday,
January 26.

HOOPER and others, assignees of WELLS, v. RAMSBOTTOM
and others,

A. sells an estate to *B.*, who pays part of the purchase money, and the title deeds are deposited with *C.*, to be delivered up to *B.*, when he pays the residue. *A.* gets possession of them again, and pledges them to *D.* for a valuable consideration. — *Held*, that *B.*, on tendering the remainder of the purchase money, is entitled to recover the deeds from *D.*

THIS was an action of trover, brought to recover the value of certain deeds, which were in the possession of the defendants, under the following circumstances. A person of the name of *Harvey*, being possessed of certain leasehold property, sold the same to *Wells*, the bankrupt, who paid part of the purchase money, but left £330 unpaid; as a security for which, the title deeds were left in the hands of *Daniel Harvey*, an attorney, and brother of the vendor, to be delivered up to *Wells*, when he should complete the payment. *Harvey*, the vendor, prevailed upon his brother to give the deeds up to him, and then deposited them with Messrs. *Ramsbottom* and Co., the defendants, as a pledge for money advanced to him by them. *Wells* became bankrupt, and his assignees, considering that they were entitled to the deeds, on payment of the remainder of the purchase money, which they tendered to the defendants, brought this action to recover them. The defendants contended that, having advanced a larger sum upon the deeds than the purchase money which remained unpaid, they had a right to retain them.—The cause was tried at the sittings after last *Michaelmas* term, at *Guildhall*, before Lord Chief Justice *Gibbs*, when his lordship considered that, as the estate had been sold to the bankrupt, and the title deeds were deposited with *Daniel Harvey* by way of *escrow*, to be delivered up when the bankrupt should com-

plete his part of the contract, the assignees, who had tendered the remainder of the purchase money, were entitled to recover; and the jury, accordingly, found a verdict for the plaintiffs.

The *Solicitor-General* now moved that this verdict should be set aside, and a new trial granted, or a nonsuit entered. The deeds which had been pledged, he said, were the same as any personal chattel, and where a chattel was pledged to an innocent pawnee, so as it were not obtained by felony, even though it should have been obtained by fraud, such pawnee, he contended, had a right to retain it, and even to recover it back again, if it were taken from him. He cited *Parker v. Patrick*, (a) where Lord *Kenyon* held that the pawnee, for a valuable consideration, of goods obtained under false pretences, might recover them back from the original owner, who had, on conviction of the offender, obtained possession of his goods. If that case were to be considered as law, the defendants in the present case were justified in retaining the title deeds, however fraudulently they might have been obtained from the original bailee.

Lord Chief Justice GIBBS.—If this proposition be correct, wherever a person gets possession of property by any means short of felony,—by any crime for which he would not be liable to be hanged,—and pawns them, the pawnee has, in all such cases, a right to retain the property. But I cannot subscribe to such a proposition. If a man were to go into a shop, and to induce the shopman to sell goods to him, though under false pretences, he might, perhaps, obtain such a property in the goods as would enable him to pawn them:—but in that case, he would get, *pro tanto*, a property in the goods. No such property has been obtained in the present case. Every man is entitled to his

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S.

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(a) 5 T. R. 175.

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property wherever he finds it, whatever may have been done by a stranger; as in the common case of a factor pledging the goods of his principal. A distinction was taken, in the case of *Parker v. Patrick*, between goods obtained by felony, and by common fraud; but that appears to have related to the statute, which entitles the owner of stolen goods to restitution, provided he prosecute the offender to conviction (a). These title deeds belonged first to the bankrupt, and afterwards to his assignees who represented him. Neither of the *Harveys* had any right over them, except to hold them until the remainder of the purchase money should be paid. That sum has been tendered, and therefore the parties are in the same situation as if it had been actually paid; and the assignees, being entitled to the estate, are also entitled to the deeds. This is a case to which, of all others, the rule of *cestui que trust* applies, because the defendants were particularly called upon to enquire into the title of the person who was in possession of the deeds. The court is of opinion that there is no ground for granting a new trial in this case.

Rule refused.

(a) 21 Hen. 8. c. 11.

Thursday,
 January 26.

CARRUTHERS v. SHEDDEN.

A. and B., trading under the firm of A. and Co., engage in an adventure, and afterwards receive C. and D. as sharers therein.

A policy is effected on account of A. and Co., and a loss having happened, the interest is averred, in the declaration, to be in A. and B.; with other counts stating it to be in the other parties respectively, which a judge at chambers directed to be struck out. It was left to the jury to say whether all the adventurers were intended to be included, which they found in the affirmative:—*Held*, that the plaintiff was entitled to recover accordingly.

THE plaintiff declared on a policy of insurance, dated the 3d of September, 1812, effected by the plaintiff, 'as agent, 'as well in his own name, as in the name and names of 'all and every other person or persons to whom the same

'did, might, or should appertain, in part or in all, on the ship *Ranger*, from *St. Domingo* to *London*,' by order and for account of Messrs. *Nathaniel Dourick*, and Co. The declaration afterwards averred, 'that the said policy was made by the plaintiff, as the agent of *Nathaniel Dourick*, and *John Way*, and for their use and benefit;—that a quantity of coffee was shipped at *St. Domingo*, on board the said ship, and that the said *Nathaniel Dourick* and *John Way* were then, and from thence until the time of the loss, interested in the said coffee, to the amount of all the monies by them insured.—By an agreement of the 19th of *March* 1810, between *Nathaniel Dourick* and *John Way*, of the city of *London*, merchants, carrying on trade under the firm of *Nathaniel Dourick and Co.*, of the first part; *T. Dixon* of the second part, *D. H.* of the third part, and *I. R.* of the fourth part; it had been agreed that the said *T. Dixon*, *D. H.*, and *I. R.* should become interested in an adventure of sundry goods, &c., which the said *Nathaniel Dourick* and *John Way* had purchased on their own separate credit, to be disposed of at *Hayti*, and the proceeds thereof to be invested in the purchase of sundry other goods, to be consigned to the joint account of the said *Nathaniel Dourick* and *John Way*. The declaration originally contained several other counts, stating the interest to be in the different parties to the agreement; but on a summons before the *Chief Justice*, his lordship ordered the additional counts to be struck out.

At the trial of the cause, at the sittings after last *Michaelmas* term, at *Guildhall*, before the *Chief Justice*, it was objected, on the part of the underwriters, that the plaintiff was not entitled to recover more than the interest of *Dourick* and Co.; confining that firm to *Dourick* and *Way*; and that that objection would have applied equally, though the counts, averring the different interests, had not been struck out. His lordship left it to the jury to

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say, whether, by the term *Dowrick and Co.*, the policy had been intended to comprehend all the adventurers, or only the two persons who composed the original firm, observing, at the same time, that they were not to give the policy this extended construction, merely because they thought the justice of the case required it, unless they should be warranted by the fact. The jury said, that they had no doubt but the fact was, that *all* the adventurers were meant to be included. The point was, however, reserved, and,

Mr. Serjt. *Lens* now moved, that this verdict should be set aside, and a new trial granted. If the interest of all the adventurers had been intended to be insured, the policy should have been effected in such a way, as that the underwriters might have known what interest they were insuring. By making the policy with this double aspect, *Dowrick and Co.* would be gaining an unfair advantage over the underwriters ; for, by this ambiguity, they had it in their power to construe the interest to be limited or not, according as the ship might, or might not, have been lost. The extent of the interest should have appeared on the policy, and been thereby communicated to the underwriters ; as the case stood, the rule applied, *expressio unius est exclusio alterius*. The finding of the jury could proceed only on the intention of the insured, as there was no evidence of any communication of such intention having been made to the underwriters, beyond the import of the policy itself, which, apparently, related only to the known firm of *Dowrick and Way*.

Lord Chief Justice GIBBS.—I reserved this point for the defendant, and have desired my brothers to take it into their consideration, and they are of opinion that there is no reason for setting this verdict aside. Another ground on which I should have directed a verdict for the plaintiff, even though I had considered that the interest ought to

have been confined to *Detorick* and *Way*, was, that they were consignees of the cargo, and that, therefore, they had a lien on it, which entitled them to make this insurance.

Mr. Justice *Heath* was of the same opinion, and observed that there was no reason why the interest should appear on the face of the policy.

Mr. Justice *Chambre* and Mr. Justice *Dallas* concurred.

Rule refused (a).

(a) See *Page v. Fry*, 2 B. and P. 240, where the purchaser of a cargo, having parted with a share of it to another house, afterwards insured it on his own account, and averred the interest to be in himself alone:—The court held that he still had an interest in the entirety of the cargo, sufficient to support the averment in the declaration, notwithstanding others had a beneficial interest in part.

But see also *Bell v. Ansley*, 16 East. 141, where the interest was averred to be in *I. B.* only, the persons really interested being *I. B.* and *W. B.*, and the policy having been made on their joint account, and for their joint use. The court held that the allegation 'on whose account and for whose use and benefit a policy is made,' was a material allegation, and should be stated according to the truth, and therefore, that the variance was fatal. Lord *Ellenborough*, in delivering the opinion of the court, said, that since the stat. 19 Geo. 2. c. 37, that had been the constant practice; and that, though an action might be brought upon a policy in the name of the person who effected it, though he were not the party interested; yet that the persons interested were so far considered as parties to the suit, that the declaration of any of them was admissible evidence against the plaintiff, and what would be a defence against them was, in many instances, a defence against the plaintiff; that therefore, the underwriter ought to be truly informed by the record on whose behalf the policy was made;—and that public policy required this, to exclude the property of enemies from the benefit of *British* insurance.—His lordship took some pains to distinguish this from the case of *Page v. Fry*.

WOODROFFE V. WILLIAMS.

THE *Solicitor-General* shewed cause against a rule, which had been obtained by Mr. Serjt. *Pell*, to amend the declaration in this action, by entitling it as of *Michaelmas* term titled, to a previous term, in order to bring it within the time limited

Saturday,
January 28.

The court will not, in a penal action, alter the term of which a declaration is entered for the action.

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1813, instead of *Michaelmas* term 1814. The action was brought on the statute of usury, and this application was made in order to bring the title of the declaration within twelve months after the offence was committed; but the court, he said, would not amend a declaration in a penal action, in order to assist the plaintiff in point of time.

Mr. Serjt. *Pell*, in support of the rule, cited a case of *Mestaer v. Hurst*, in which the court of *King's Bench*, in the present term, had amended a misnomer of the defendant's christian name in a penal action. So, in the present case, the amendment to be made was a mere matter of form, and might have been made on a summons before a judge, and the circumstance of its being a penal action made no difference.

Lord Chief Justice GIBBS.—This is an application to amend the memorandum of a declaration, which now stands entitled as of *Michaelmas* term 1814, to *Michaelmas* term 1813. There is no affidavit in support of the motion, nor do we see any reason for making the amendment. The plaintiff alleges, as a reason for doing it, that it would let him into a case from which he will be excluded, if the declaration remain as it now stands. The court, however, cannot help that:—If the plaintiff be able to connect the writ with the declaration, there is no necessity for the amendment; if he cannot, the court will not assist him.—
Per Curiam,

Rule discharged.

CIRAGNO v. HASSAN.

1815.
Tuesday,
Jan. 31.

THE *Solicitor General* moved for a rule to compel the plaintiff in this action to give security for costs, on an affidavit, which stated that the defendant was captain of a Turkish vessel;—that the plaintiff was a sailor on board the same ship, and had been hired on the terms usual in Turkey; viz. not to receive wages, but a share of the profits at the conclusion of the voyage; that the vessel, in the prosecution of a voyage from *Smyrna* to this country and back, had arrived at *London*;—and that the sailors, having deserted, and being, in consequence, afraid of returning to *Smyrna*, had arrested the captain in twelve different actions, for wages claimed to be due to them.

On a motion to compel the plaintiff to give security for costs, the court will not enter into the merits of the case, nor grant the rule on account of the hardship of the case upon the defendant.

Lord Chief Justice GIBBS.—It would be a very bad example, if the court were to go into the circumstances of the case, and the foundation of the action, in order to judge whether they should call on the plaintiff to give security for costs. If that should be made an ingredient in our decision, we must go into the merits of the cause on every application of this kind. There is no instance in which the court has granted this rule on these grounds, where the plaintiff has been in this country; and though I do not mean to lessen the hardship of the defendant's case in the present instance, I think the general rule is of greater consequence than his individual convenience.—*Per Curiam*,

Rule refused (a).

(a) *Vid. ante*, p. 4.

1815.
Wednesday,
February 1.

PRIDEAUX and another v. GIFFORD and wife, defendants.

The court will allow a fine *sur concessit*, for conveying a life estate, and a fine *sur cognizance de droit tantum*, for conveying a reversionary interest in the same premises, to pass as one and the same fine.

THE deforciant in this case were possessed of two different species of interest in the premises intended to be conveyed; being seized thereof for their lives respectively, and being entitled to the reversion, in default of issue. In order to pass these two different interests, the parties levied a fine, having a twofold operation; viz. a fine *sur concessit*, to pass the life estate, and a fine *sur cognizance de droit tantum*, to pass the reversionary interest; but with only one writ of covenant, and one concord. When this fine was carried to the chirographer, that officer objected to pass it, on the ground that there were two operations in the same fine, for the purpose of conveying two distinct estates.

Mr. Serjt. *Heywood*, on a former day in this term, moved that the chirographer might be ordered to allow this fine to pass. The court, however, refused to consider the question, except in the presence of the chirographer, who was accordingly ordered to attend, either personally or by deputy, on a subsequent day, and report his objections to pass the fine.

The chirographer, accordingly, on a subsequent day, attended; and Mr. Serjt. *Onslow*, as his counsel, insisted that this fine could not be allowed to pass, either on principle or on precedent. It was an attempt to make one fine, by giving it this conjoint operation, answer the purpose of two fines; by which means, the interests of the revenue would suffer, since one stamp would be made to serve for two fines. The forms of the office had been settled with great deliberation, and the officers were acting under considerable responsibility, and were not to be considered merely as transcribing clerks. The case, he

said, was not a new one ; for in the case of *Lazenby v. Knight* (a), the chirographer having refused to pass a fine *sur cognizance de droit com cœo*, &c., and a fine *sur concessit*, in the same concord, the court held that this sort of double fine was unprecedented, and accordingly, the fine *sur concessit* was struck out.

Mr. Serjt. *Heywood*, *contra*, insisted that there was no foundation for the objection. He cited *Ludlow v. Drummond* (b), where it was decided that a fine *sur concessit* would pass particular estates, together with the reversion in fee. [Lord Chief Justice *Gibbs*.—The only difference between a fine *sur concessit*, and a fine *sur cognizance de droit tantum*, is, that by the former, the deforciant is supposed to have granted the estate ; by the latter, he acknowledges the right to be in the cognizee. As to the question, whether the reversion will pass by a fine *sur concessit*, that only concerns the parties themselves:—All that we have to consider is, whether the fine pass in the proper form.]—*Adjournatur*.

On this day, the *Lord Chief Justice* stated the opinion of the court to be, that the fine should be allowed to pass. But his lordship observed, that no reflection whatever ought to be cast on the officer, for the doubts which he had entertained ;—on the contrary, that he was rather to be commended for applying to the court to solve such doubts (c). Whether the fine were operative or not, was

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v.
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(a) *Barnes*, 216.(b) 2 *Taun.* 84.

(c) The officer produced to the court several precedents of orders by the court, which, Lord C. J. *Gibbs* observed, shewed abundantly the propriety of the present appeal to the court. One of them was as follows: ' *Trin.* term, 20th *Geo.* 3., Upon reading the concord of the fine between the parties, and it appearing that part of the premises are in possession, and part in reversion, I do order that the same be amended, by striking out the part in possession, and passing it as to the reversion only; a new fine having been levied of the premises in possession, of the said term. 2d Oct. 1780. *H. Gould*.'—The *Chief Justice* remarked, that it appeared by this order of Mr.

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a question which it was not necessary for the court to decide.

The chirographer was accordingly ordered by the court to suffer the fine to pass; it not being considered necessary to draw up, and serve upon him, a rule for that purpose.

J. Gould, that, after the fine had been levied of the two different estates, the parties, doubting of the operation of this double fine, passed another, and then came to the court to amend the former, by striking out the estates in possession.—There was another order of *Mr. J. Gould*, as to a concord comprising a fine *sur cognizance de droit come ceo, &c.*, and a fine *sur cognizance de droit tantum*, by which it was directed that the latter should be struck out, and that the fine should pass as to the former only.

Wednesday,
Feb. 1.

BALEI v. BATLEY.

An affidavit of debt, stating that the defendant is indebted to the plaintiff on promissory notes of the defendant, without stating how the plaintiff became entitled to recover upon them, is defective.

Mr. Serjt. Best, on a former day, obtained a rule *nisi* to discharge the defendant out of custody, on entering a common appearance, on the ground that the affidavit of debt was defective. It stated the defendant to be indebted to the plaintiff on certain promissory notes of the said defendant, stating the respective dates of them, but not alleging that they were payable to the plaintiff, or that they were payable to any other person, and had been indorsed to the plaintiff.—The *Chief Justice* observed, that the application had been made to him at chambers, and that the objection then struck his lordship as being worth considering. It was usual to state the connection between the plaintiff, and the other parties to the notes, in order to shew how the plaintiff became entitled:—In the present case, the plaintiff might claim either as payee or indorsee.

On this day, Mr. Serjt. *Vaughan* was to have shewn cause; but the court being unanimously of opinion that the affidavit was defective, the rule was made

Absolute (a).

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(a) *Vide antè*, p. 315, *et seq.*

WILSON v. FORSTER.

THIS action was brought to recover a total loss on a policy of insurance, effected the 7th of *September* 1810, on the ship *Agatha*, and freight, at and from *Liverpool*, to her port or ports of discharge in the *Baltic*. The interest was averred in the declaration to be in the plaintiff, and the loss was alleged to have happened by seizure of the ship and goods, near *Pillau*, by persons unknown.—The cause was tried at *Guildhall*, at the sittings after last *Easter* term, before Lord Chief Justice *Gibbs*, when a verdict was found for the plaintiff, subject to the opinion of the court on a case, which stated, in substance, as follows.

The plaintiff was sole owner of the ship *Agatha*, which sailed from *Liverpool*, with a cargo of goods on freight, bound to *Pillau*, on the 24th of *September* 1810. In the course of the voyage, the ship, after sustaining considerable damage, arrived in *Pillau* roads on the 10th of *November* 1810, and the next morning sailed into *Pillau* harbour, where she was immediately, with her cargo, seized and taken possession of by the officers of the *Prussian* government. The master had not afterwards any command over the vessel, nor was he able to use any means to recover possession of her, until she was repurchased by him

Friday,
February 3.

Where a ship is seized and condemned by a foreign state, and purchased by the master on behalf of his owner, the owner can only recover as for a partial loss; for the property in the ship is not divested out of him.

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FORSTER.

at the public sale by auction, held by the maritime court at *Pillau*, on the first of *April* 1811, for the sum of 552 rix dollars, when she was delivered to him, and he was then at liberty to sail with her in any direction he thought fit, and he had the command of her in the same manner as before the seizure. He stated in his evidence that, in his judgment, the most advantageous course that could be taken for his owner, was to recover possession of the ship, by paying the said sum of money at the auction, on which occasion he considered himself acting as the owner's agent. The vessel was not then in a sea-worthy state, or capable of prosecuting her voyage in the *Baltic*, or of returning to *Great Britain*; and the master, having taken possession of her, caused her to be repaired, and rendered sea-worthy, after which he navigated her safely home to the port of *London*, where she arrived in *August* 1811. The owner had notice of her arrival, and the master held her there for and on account of the owner, and was ready to have delivered her up to him, or his agents, if he had been required so to do; and the owner might then, if he had thought fit, have had possession of the ship, in a perfectly safe and sea-worthy state.—A bottomry bond had been given by the master at *Pillau*, for the money with which he repurchased the ship, the amount of which the owner refused to satisfy; and it was, in consequence, put in suit in the admiralty court here, and the vessel was taken possession of by the marshal of that court. On the 2d of *December* 1812, a decree of sale was made in favour of the holder of the bottomry bond, and on the 21st of *January* following, a commission of sale issued, in pursuance of which the ship was sold by public auction, and the proceeds thereof, and of the homeward freight, were paid over by the registrar of the admiralty court, to the holder of the bottomry bond,

under the decree. It was admitted that the plaintiff was entitled to a total loss on the freight.

The question for the opinion of the court was, whether the plaintiff were entitled to recover a total, or only a partial loss upon the ship.

The case came on for argument on this day, when

Mr. Serjt. *Lens*, for the plaintiff, premised that the question was, whether the plaintiff were to be considered as having recovered his ship, after her condemnation;—whether any right could be said to have revested in him by any of the subsequent transactions,—or whether, having lost all property in her by the seizure, he were not entitled to renounce all concern with her, from the time of that seizure. The case, he said, had omitted facts which ought to have appeared upon it; the present argument, however, must be directed to it as it then stood; and he contended that there was sufficient to shew that, though the master had acted as owner, and with the best intentions, yet that the property in the vessel, having been once divested, had never been resumed. It would be contended, on the part of the defendant, that the owner was affected by the act of his agent; this, however, was not like the ordinary case of capture, where, by subsequent events, the owner gets into possession again, as in the case of recapture. In that case, the owner was put into full possession of his ship again, and could not construe that into a total loss; he could only recover a partial loss, for the expense incurred in recovering the ship. In the present case, the ship had been condemned by a hostile act of the *Prussian* government, and had been put up to sale to any person who chose to purchase her. The master had exercised his own judgment, and had bought the ship at his own risk, without any authority from his owner, who disavowed that purchase:—His character of master was at an end, and he had bought her as any stranger might have done.

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[Lord Chief Justice *Gibbs*.—How can you distinguish this case from that of *Mc. Masters v. Shoolbred* (a)? In that case, the ship was captured by a *French* frigate, and carried to *Charleston*, where she was sold as a prize, and purchased by the captain on account of the owners.—In an action against the underwriters, to recover a total loss, Lord *Kenyon* said that it was impossible to make it more than a partial loss, the insured not having abandoned at the time of the capture;—that the captain was to be considered as agent for the owners, as recovering so much property on their account, and that they had, therefore, a right to recover only so much as the injury sustained amounted to.] Mr. Serjt. *Lens* admitted that the only way by which the two cases could be distinguished was, that, in the case cited, the seizure and sale were by individuals;—in the present case, they were by an act of the state, not by that of the captors: for, properly speaking, there were no captors in the present case; it was a forfeiture to the *Prussian* government, which detained the ship till she was sold on behalf of that government. This, he said, was the whole of his argument; for if it were to be considered as the case of a common capture and recapture, there was no doubt but the property would have reverted in the owner. [Lord Chief Justice *Gibbs*.—The ship was condemned, because she had violated some law of the *Prussian* government, which is similar to our fiscal law.] Mr. Serjt. *Lens* contended, that this was not to be considered as a fiscal condemnation, but as an act of violence on the part of the *Prussian* government, though not actually at war with this country. The owner would have had no right to take possession adversely against the captain.

Mr. Serjt. *Vaughan*, *contra*, was stopped by the court.

(a) 1 *Esp. Rep.* 237.

Lord Chief Justice GIBBS.—I do not know what effect would have been produced by the facts alluded to by my brother *Lens*; but as the case now stands, it appears that there has been an unlicensed seizure, and the master has purchased the vessel of those who had no right to condemn her. The question, therefore, is, whether he have not bought her with a bad title; and whether, if the insured chose to take possession of her, the master could have resisted him. I am of opinion that the plaintiff was entitled to the possession of her, and if that be the case, he is only entitled to recover the expence incurred in the purchase and repair of her.

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—
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The rest of the court concurred.

Judgment for the plaintiff, for a partial loss only, to be ascertained by an arbitrator.


SUTTON v. CLARKE.

Friday, Feb. 3.

THIS was an action on the case, against one of several trustees under the stat. 5 Geo. III. c. 105, for repairing and widening the road from *Banbury*, in *Oxfordshire*, to *Lutterworth*, in *Leicestershire*; and was brought to recover a satisfaction for damage occasioned to the plaintiff's land, by the overflowing of a drain or watercourse, made

By a turnpike act trustees are appointed with authority to cut drains in lands adjoining the roads, making reasonable satisfaction to the owners thereof.

By the same act it is provided that all actions, for any thing done in pursuance of the act, shall be brought within *six months* after the doing the thing complained of. A drain is cut, by an order signed by a competent number of trustees, and according to the plan of a surveyor, in land adjoining the plaintiff's, by which the latter is overflowed. An action is brought against one of the trustees only, more than six months after the act done, and the first injury sustained, but within six months after a subsequent injury accrued.—*Held*, 1st, that the action, if it could have been supported at all, was well brought against the defendant only:—But 2dly, that the trustees, having acted to the best of their skill, and with the best advice, were not answerable for the damage which had accrued.—*Seemle*, that the limitation of the action is to be reckoned, not from the time of doing the act, but of sustaining the injury:—*Quære*, whether this be confined to the first injury sustained, or whether an action might not be brought within six months after any subsequent injury?

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by the defendant and his co-trustees, under colour of the act. The first count of the declaration, after reciting that part of the act which gives authority to the trustees to cut drains (a), stated that, 'the plaintiff being lawfully 'possessed of three closes, near a certain road in the said 'act mentioned, on the 10th of *June* 1812, a certain 'watercourse or drain had been made or dug by the 'defendant from the said road, into certain land near the 'land of the plaintiff, under colour of the powers and authorities given by the said act; but of so insufficient 'breadth, depth, and length, that by means of the narrowness and insufficiency thereof, and of the same not 'having been continued a sufficient distance from the 'said road, large quantities of water, from time to time 'flowing to the same, on the 1st of *October* 1812, and 'on divers other days and times, &c. had flowed upon 'the plaintiff's lands, whereby the plaintiff sustained 'damage to the amount of £200. Yet the defendant, 'being one of the trustees for carrying the said act into 'execution, well knowing the premises, but contriving 'and intending to injure the plaintiff, on the 1st of *June* '1813, and from thence hitherto, wrongfully and injuriously kept and continued the said watercourse of such 'insufficient breadth, depth, and length; by reason

(a) By that statute it is enacted, among other things, 'That it 'shall be lawful for the trustees, or any five or more of them, or 'any surveyor or other person, by them or either of them appointed, 'to make causeways in or along the sides of the said roads, and to 'cut any watercourses in, through, or across any lands or grounds, 'in order to drain or prevent the said roads from being overflowed, ' &c. &c.; making such reasonable satisfaction to the owners or 'occupiers of such grounds, as to the said trustees shall seem reasonable.'—By a subsequent clause it is enacted, 'that if any action 'or suit shall be brought against any person, for any thing done in 'pursuance of this act, such action shall be commenced within six 'months next after *the doing* the matter or thing for which such 'action shall be brought, and not afterwards.'

‘ whereof, and of its not having been kept at a sufficient distance, on the said 1st of *June* 1813, and on divers other days, &c. large quantities of water, which had flowed into such insufficient watercourse, overflowed the same, and flowed over the plaintiff’s land, and continued thereon from thence hitherto, whereby the plaintiff’s crops were spoiled:—Yet that the defendant, though requested, had not made any reasonable satisfaction to the plaintiff, but wholly neglected and refused, contrary to the form of the statute, &c.’—There were three other counts, stating the case more generally; the two last of which did not state any intention, on the part of the defendant, to injure the plaintiff.

The cause was tried before Mr. Justice *Chambre*, at the last assizes for the county of *Warwick*, when it appeared that the drain was cut in the spring of the year 1812; that the injury was occasioned by its having been contracted in its width towards the bottom, which straitened the passage for the water, and threw it upon the adjoining land; that the defendant had no intention of injuring the plaintiff’s property; that the drain was cut in pursuance of a plan which had been approved of by a surveyor; that the order by which it was made was signed by a competent number of trustees, and by the defendant, as chairman; that the plaintiff made no application to any meeting of the trustees for a compensation; that the first damage sustained by the plaintiff was in *November* 1812; that his land was again overflowed in *April* 1814; and that the action was commenced in *May* 1814.—Several objections were made on the part of the defendant, which resolved themselves into three:—*First*, that the action could not be maintained against the trustees for any thing done by them under the authority of the act; and especially that the plaintiff could not recover on the 3d and 4th counts, which did not state the act

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complained of to have been done maliciously :—*Secondly*, that at all events, the rest of the trustees should have been joined in the action ; one of several trustees not being, alone, answerable for the act of all of them :—*Thirdly*, that the action had not been brought within six months after the act was committed ; which was the time limited by the statute.—The learned judge was of opinion that, as the defendant was only one of several trustees, acting with the rest, and without any malice imputable to him, the plaintiff should have applied for a compensation at a meeting of the trustees, or to the court of *King's Bench* for a *mandamus* ; and that, as the commissioners had only exercised the authority vested in them by the statute, the action was not sustainable. However, he refused to nonsuit the plaintiff, but directed a verdict for him, with liberty to the defendant to move to enter a nonsuit, if the court should be of opinion that the action could not be supported. Accordingly, a rule *nisi* was obtained by Mr. Serjt. *Lens*, in last *Michaelmas* term, on the authority of *The British cast Plate Company v. Meredith* (a), where the court of *King's Bench* held that the commissioners under a paving act were not liable to an action for damage occasioned by them, provided there were no excess in the exercise of their authority.


The *Solicitor-General*, Mr. Serjt. *Vaughan*, and Mr. Serjt. *Copley*, on a subsequent day in that term, shewed cause.—With regard to the first and principal objection, the question, they said, was, whether the trustees were to be absolved from all responsibility for the damage which they might occasion to individuals, however badly or unartificially they might execute the powers vested in them. As to the compensation which, it had been suggested, the plaintiff might have had recourse to, the only damage,

(a) 4 T. R. 794.

for which the act had given a remedy, was that which might be sustained by the person in whose land the drain should be actually cut; there was no compensation for the owner of the adjoining land, in case it should be overflowed; unless, therefore, he could recover damages through the medium of an action, he would be unable to obtain any redress. In this particular, the case of *The British cast Plate Company* was very distinguishable from the present; because there, the commissioners were expressly authorized to make compensation for the damage sustained, and Mr. Justice *Buller* founded his judgment on that circumstance. In that case, likewise, the act complained of was one which they were expressly authorized to do, and which they had done properly; for there was no pretence for imputing any want of skill or care to them;—indeed it was an act which would necessarily be productive of damage, in whatever way it might be done. Here, on the contrary, the defendant had done that unskilfully, which he might and ought to have done properly;—the damage had accrued by the negligent exercise of those powers which the act had vested in him. In *Leader v. Moxon* (a), which, they said, was exactly in point, this doctrine was expressly recognized, and the court held that the defendants, who were also commissioners under a paving act, had not an arbitrary discretion, but were limited by law and reason. Suppose a water company were to put down pipes of insufficient strength, which should burst and overflow the streets. [Lord Chief Justice *Gibbs*.—There, the resemblance fails in the most important particular; for the water company would be acting for their own advantage.] Suppose, then, trustees were empowered to pull down houses, and in the execution of that authority, were to occasion

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(a) 3 Wils. 461, 2 Bl. 924 S. C.

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the destruction of a house which they had no authority to pull down;—or suppose the trustees of roads, in the execution of their office, should leave a hole or other nuisance in the road, by which an injury should accrue to a third person;—surely, in such case, the trustees would be liable. [Mr. Justice *Chambre*.—In the present case, there was a plan submitted to the trustees, and they, after taking the advice of a surveyor on the subject, adopted the plan, and gave it to proper persons to execute.] Whether the trustees had acted on their own judgment, or that of another person, if the work were done unskilfully, they were equally liable at law, they contended, though they were not culpable in point of moral responsibility; for when they adopted the advice of the surveyor, they made the plan their own. Unless, therefore, the defendant could establish this proposition, that, however unskilfully the drain might have been cut, he was not liable, unless actual malice could be proved, this objection would be no defence to the action.—The *second* objection, as to joining the other trustees in the action, was not insisted upon by the other side.—*Thirdly*, as to the limitation of the action, they contended that it was not necessary that it should be brought within six months after the act was done, nor within six months after the first injury was sustained;—that period was to be reckoned from the time when the damage, which was the subject of the action, was produced. [Lord Chief Justice *Gibbs*.—The defendant insists, not that the action must be brought within six months from the time when the act was done; but that, as soon as it appeared that the act was of such a complexion that damage must ensue from it, the six months must be calculated from that time.] As long as the drain remained inartificially made, and damage continued to be sustained by it, the plaintiff, they contended, had a right of action; in the same way as every continuance

of a nuisance was a fresh nuisance;—for otherwise, if the plaintiff must inforce his action as soon as he had received a *scintilla* of damage, the defendant would be indemnified for all injury which his neglect had occasioned, by paying a very trifling sum; for the damage occasioned within the first six months, probably, did not amount to £5. The plaintiff could not have recovered prospective damages, as the owner or reversioner perhaps might, as being an injury to the inheritance;—the mere occupier of the land would have been confined to the damage, however small, which he might have sustained at the time of bringing his action, and could not recover on the vague speculation of what might happen at subsequent periods. In *Roberts v. Read* (a), the *King's Bench* held that the defendants, having in the execution of their office, as surveyors of the highway, undermined a wall adjoining the highway, were liable in an action on the case, though the wall did not fall till more than three months after the act committed, which was the time limited. In that case, Lord *Ellenborough* took the distinction between an action of trespass, and on the case; the consequential damage being the very gist and foundation of the latter action; and Mr. Justice *Bayley*, in that case, asked how the damage was to be estimated, before it actually happened. [Lord Chief Justice *Gibbs*.—Certainly that is a very strong case.]

Mr. Serjt. *Lens* and Mr. Serjt. *Pell*, *contra*, observed that the first and principal question was a subject of great importance, not only to these parties, but to all persons in the character of trustees. If it should be decided in favour of the plaintiff, it would put an end at once to all disposition in gentlemen to take upon themselves an office which was attended with much trouble, and no possible profit. The trustees had been acting in the way

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(a) 16 East. 215.

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which they considered as best calculated to carry the intention of the legislature into execution; and though they might have been mistaken in their judgment, they were not to be liable to an action on that account. The question was, whether, in consequence of an act which he had been called upon by the legislature to do, the defendant were liable for damage accruing to a third person, without any proof that he had acted maliciously. The two first counts of the declaration, they said, had made the *gist* of the action to depend on the voluntary and malicious act of the defendant; for after stating the injury, it was alleged that the defendant, 'knowing the premises, but contriving to injure the plaintiff, *wrongfully and injuriously* continued the cut so insufficiently made;'—though they admitted that, if the action could be supported, without proving that allegation, it might be rejected as surplusage. [Lord Chief Justice *Gibbs*.—To be sure, it resolves itself into the question, whether it be necessary to prove malice; for on that depends the question, whether the allegation be material, or not.] The defendant, they contended, could only be liable on the ground that he had deviated from the course prescribed by the act, or that he had exceeded the powers which had been intrusted to him. The argument which had been used by the plaintiff, that unless this action could be sustained, he should be without redress, was answered by Lord *Kenyon*, in his judgment on the case of the *British cast Plate Company*, where he said, 'If the legislature think it necessary, they enable the commissioners to award satisfaction to the individuals who happen to suffer; but if there be no such power, the parties are without remedy, provided the commissioners do not exceed their jurisdiction.'—In the present case, they said, there had been no more an excess of jurisdiction, than in the case alluded to. Mr. Justice *Buller*, in his judgment on that case, referred it to the

broad and general principle, *Salus populi suprema lex*; and illustrated it by one of the strongest cases that could be put,—the defence of the kingdom against the king's enemies.—In *Leader v. Monon*, the defendant had done the very thing which was expressly provided against by the act from which he derived his authority.—As to the second objection, that the action was brought against one of the trustees only, they should not, they said, contend that that objection was fatal in point of law; they should only observe that it was an additional reason to take care that the action was rightly brought in other respects; since the defendant, perhaps, might have been the very person who opposed the making of the drain.—With respect to the third objection, that the action had not been brought in due time, they contended that trustees for public purposes were not to be liable all their lives for damage done by them, as in the case of private persons. The plaintiff must exercise his judgment, in deciding whether the act were likely to produce an injury or not, and could not wait till the damage had actually accrued, at however distant a period. The action might be brought by the occupier and reversioner together. [Lord Chief Justice Gibbs.—The case of *Roberts v. Read* certainly relieves the plaintiff from the necessity of calculating the six months from the time when the act was done. I confess I should have had great difficulty on that point, because, however absurd it may be, the legislature has directed these actions to be brought within six months after *the doing* the thing complained of:—The *King's Bench*, however, following the justice of the case, has decided otherwise, and certainly the two cases cannot be distinguished.] At all events then, they contended, the action should have been brought within six months after the time when the injury was first sustained; and this for two reasons,—*first*, because the jury could have estimated the future damage by

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that which had been already sustained ;—and *secondly*, in order that the trustees might make an alteration as soon as possible. They cited Lord *Ellenborough's* judgment in the case of *The King v. The Justices of Staffordshire (a)*, to shew that, even where there is hardship in the case, still the court could only follow the directions of the statute.

Cur. adv. vult.

On this day Lord Chief Justice GIBBS delivered the judgment of the court.

This action is brought against one of several trustees under a turnpike act, who has joined in an order made by the other trustees, the consequence of which order has been that, at a subsequent period, considerable damage has accrued to the plaintiff's estate ; though that consequence was unforeseen at the time when the act was done. It was proved at the trial that, when the trustees ordered the drain to be cut, they informed themselves how it could best be done, and took the opinion of a surveyor upon the subject, who said that it was not likely to produce injury to any one. No negligence, therefore, can be imputed to them ; they only did what the act required them to do, and they did it in the best manner they were able, and according to the best information ; though it turned out that they were mistaken in their judgment. By the statute from which the trustees derived their authority, it is enacted that no action shall be brought for any thing done in pursuance of the act, except within six months after *the doing* the thing for which it shall be brought. In the present case, the drain was cut, and the first injury was sustained, more than six months previously to this action ; but another and further injury ac-

(a) 3 *East*. 151.

crued a short time before the present action was brought.—Three objections have been made to the action, on each of which the defendant insists that the plaintiff should be nonsuited. The second objection, which I shall dispose of first, is, that the other trustees ought to have been joined:—If that had been the only objection, we are clearly of opinion that it would not have prevented the plaintiff from recovering.—The principal objection is to the merits; *viz.* that the trustees under this act, as they derived no benefit from their office, are not answerable for any damage which may have accrued in consequence of any act done by them within the limits of their authority, provided they used their best skill and diligence, and obtained the best advice that was to be procured. Two cases have been cited, one by the plaintiff, the other by the defendant;—on the authority of the first, it is contended that the action may be supported; on that of the second, it is as strenuously insisted that the defence may be maintained. The case cited by the plaintiff is that of *Leader v. Moxon*; where, though the defendants had not exceeded their jurisdiction, the court thought that they had acted in a most oppressive and tyrannical manner; and that, therefore, though they would have had a right to do what they did, had they done it properly, they were answerable for the consequences of their oppressive conduct; and we entirely concur with that judgment. That, however, is not the present case; the defendant has acted neither oppressively nor wantonly. In *Leader v. Moxon*, the damage might have been obviated, by doing the act complained of in a different manner; in this case, the defendant took every precaution to prevent the drain from occasioning any injury;—that case, therefore, does not come up to the present, on the part of the plaintiff. The other case is that of *The British cast Plate Company*, where the injury complained of was,

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that the defendants had raised the ground opposite the plaintiff's gateway; the act, however, had directed them to make a regular descent, and there was no other way to make it, except that in which they did it; that case, therefore, does not come up to the present, on the part of the defendant; because *here*, the mode of cutting the drain was left to the defendant. The question, therefore, remains, whether the defendant, having done what he was required to do in the best way, according to his judgment, and the best advice that was to be procured, be answerable for the injury which has eventually happened;—we are of opinion that he is not. This case is perfectly unlike that of an individual who makes an improvement on his own land, from which an injury eventually accrues to another; such person must answer for the injury, because he was acting for his own benefit. In this case, the defendant was not a volunteer, but was executing a duty imposed on him by the legislature, which he was bound to execute, and for the omission of which he would have been liable to punishment; and he is not answerable for a consequential injury, which not only he did not foresee, but which he had no means of foreseeing.—The case being disposed of on this ground, it is not necessary to give any judgment on the question as to the limitation of the action.

Rule absolute to enter a nonsuit.

SERRA and others v. FYFFE.

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Monday,  
February 6.

THE plaintiffs declared as obligees of a bond, dated the 25th of *March* 1805, against the defendant, as obligor, in the penalty of £1000.—The defendant cravedoyer of the bond, and of the condition, which, after reciting that one *W. Begbie* had been appointed collector of the poor's rates, in the parish of *St. George the Martyr*; and that the defendant and *I. H.* had proposed themselves as security for the said *W. Begbie*, until all accounts should be fully and truly settled and paid; provided, 'that if the said *W. Begbie* did and should, from time to time, and at all times thereafter, deliver to the directors of the poor of the said parish a just and true account in writing, of all monies received by him in pursuance of his office, and from whom received respectively, and of all sums of money from time to time outstanding, with the names of the persons from whom due, verified upon oath; and should well and truly pay to such persons, for such purposes, and in such manner, as the directors should appoint, all such sums as should appear to be received by him, without fraud or further delay; and, in all other respects justly, truly, and faithfully discharge and execute the duties of his office;—then the obligation to be void.'—The defendant then pleaded *first, non est factum*; *secondly*, that the said *W. Begbie* did from time to time, and at all times after the making of the said writing obligatory, well and truly observe, perform, fulfil, and keep all and singular the articles, clauses, payments, conditions, and agreements in the said condition specified, on his part and behalf to be observed, &c., according to the true intent and meaning thereof.—The replication, as to the

To debt on bond, the condition of which was, 'that *A. B.* should deliver a true account of all monies received by him in pursuance of his office,' the defendant pleaded performance generally;—The plaintiff, in his replication, assigned for breach, 'that *A. B.* was requested to deliver a true account of all monies received by him in pursuance of his office, but refused so to do.'—*Held*, on special demurrer, that this assignment of the breach was bad, in not alleging 'that *A. B.* had received any monies by virtue of his office.'

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second plea, alleged that *W. Begbie* continued collector of the said rates until the 26th of *February* 1812, when he was requested by the said directors to deliver to them a just and true account in writing of all monies received by him, in pursuance of his said office, and from whom received respectively, but that he refused so to do. There was a further breach, which stated that *W. Begbie* received divers sums of money, which he did not pay over as directed; on which breach issue was taken. To the first breach, the defendant demurred;—assigning, among other causes of demurrer, that it was not alleged, nor did it appear thereby, that the said *W. Begbie* ever received any monies by virtue of his said office; and that the said first breach contained a negative pregnant, in alleging that the said *W. Begbie* had not delivered an account of the monies received by him in pursuance of his office, without averring that he *had* received monies in pursuance of his office; by the omission of which averment, the defendant was prevented from traversing and putting the same in issue. The plaintiff joined in demurrer, and on this day the case came on for argument.

Mr. Serjt. *Vaughan* was to have argued in support of the demurrer, but the court called on the plaintiff's counsel to support the replication.

The *Solicitor-General*, accordingly, contended that this fell within the principle of assigning breaches in the words of the covenant. [Lord Chief Justice *Gibbs*. Where a fact must previously have existed, before the defendant could possibly break the covenant, that fact must be averred; the question, therefore, is, whether, in the present case, it be not necessary that *Begbie* should have received money, before he could account.] The *Solicitor-General* admitted that he should have considered a more explicit statement to have been necessary, but that the point appeared to have been decided otherwise in a case

of *Willcocks v. Nicholls* (a), which was an action on bond for the performance of an award. The replication assigned for breach, in the words of the award, that the defendant did not render to the plaintiff an account of debts due to the partnership; to which the defendant demurred, on the ground that it did not appear that there were any debts outstanding. The court held that that case fell within the rule in *Com. Dig. tit. Pleader* (C. 45), where it is said to be sufficient to assign the breach in the words of the covenant, promise, &c.:—And Mr. Baron Wood observed, that the assignment of the breach necessarily implied that money had been collected; that is, the *onus* was on the defendant to shew that he had not received any money: He it was, and not the plaintiff, who was to render the account. The court were also of opinion, in that case, that it was not incumbent on the plaintiff to state such facts as lay within the defendant's knowledge. The defendant, he observed, would not be without remedy, though the court should decide that it was not necessary to state that any money had been received; for he might, in his rejoinder, negative that fact. [Lord Chief Justice Gibbs. The bond is conditioned for the performance of one of two things, or of both, if the event should require it;—if *Begbie* received money, he was to account for it; if not, he was to return a list of defaulters; if, therefore, he had received no money, the breach should have been in the other alternative.] The question, he said, was the same as if there had been but one alternative; because he might have returned a list of defaulters, and yet have received money for which he had not accounted.

Lord Chief Justice GIBBS.—The practice formerly

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(a) 1 *Price's Excheq. Rep.* 109.



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was, for the defendant to allege performance specially in his plea, and while that particularity was required in the plea, the replication was much facilitated by it.—The rule was held so strictly that in a case like the present, it would have been necessary for the defendant to have averred, either that he had received no monies, or, if he had, that he had accounted for them; and general performance would have been bad on special demurrer; but if the plaintiff had not demurred, it would have been incumbent on him to point out the special breach.—Where there are some conditions in the negative, and some in the affirmative, or where some are in the alternative, general performance is not sufficient. In this view of the case, therefore, and unless the law on this subject be much altered since I had more to do with pleadings than I lately have had, the breach is ill assigned. I think the plaintiffs had better move to amend.

The plaintiffs, accordingly, had leave to amend, on payment of costs; and the defendant was at liberty to plead *de novo*.

Tuesday, Feb. 7.

BURTON v. HICKEY.

Where judgment is given on demurrer for the avowant in replevin, fifteen days notice of executing the writ of inquiry should be given to the plaintiff, as in the case of nonsuit, on stat. 17 Car. 2, c. 7.

MR. Serjt. *Lens*, on a former day in this term, obtained a rule to shew cause why the execution of the writ of inquiry of damages in this cause, which was an action of replevin, should not be set aside for irregularity. The plaintiff had demurred to the defendant's avowry, and judgment was given on the demurrer for the avowant. On the 4th of *January*, the avowant's attorney served the plaintiff with a notice that a writ of inquiry would be executed on the 12th of *January* following; which was executed accordingly. The ground of the present application was, that only eight days notice of the

execution of the writ of inquiry had been given, instead of fifteen days notice, as required by stat. 17 Car. 2. c. 7. (a).

Mr. Serjt. *Best* now shewed cause, and contended that as this was a case of demurrer, and therefore came under the third section of the act, eight days notice was sufficient, as in ordinary cases, since no number of days was fixed in that section. The same necessity for fifteen days notice did not exist in the case of demurrer, as in case of nonsuit; because the plaintiff, when he demurred to the avowry, must have been apprized of the nature of it. There was no authority in point upon the subject.

Mr. Serjt. *Lens*, *contra*, observed that there was no foundation for this distinction;—that the two clauses of the statute were to be considered as one provision, though for two different cases. The first section having provided for the case of nonsuit, and fixed the length of the notice to be given; the second section gave the defendant the same indulgence in the case of demurrer, but upon the same terms: According to the argument used by the other side, no notice at all was necessary in the case of demurrer.

Lord Chief Justice GIBBS.—The books of practice consider all writs of inquiry under this statute as subject

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(a) The second section of that statute, being 'an act for a more speedy proceeding upon distresses and avowries for rents,' enacts, 'that when any plaintiff in replevin shall be nonsuit before issue joined, the defendant making a suggestion in nature of an avowry or cognizance, to ascertain the court of the cause of distress; the court, on his prayer, shall award a writ of inquiry to the sheriff, touching the sum in arrear at the time of the distress, and the value of the goods or cattle distrained; and thereupon notice of fifteen days shall be given to the plaintiff or his attorney in court, of the sitting of such inquiry,' &c. &c.—The third section enacts, 'that if judgment be given upon demurrer for the avowant, or cognizor, the court shall, at the prayer of the defendant, award a writ to inquire of the value of the distress,' &c;—without making any regulation as to notice.

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to the same rule; I am not speaking of books of practice as authority, but we are furnished with no cases on the subject; it is therefore to be considered as mere matter of practice, and certainly we feel inclined to abide by that practice. These are not like ordinary writs of inquiry;—they are given by the statute in particular cases, and the statute having prescribed a notice of a certain length for one case, it is not unreasonable to extend it, by parity of reasoning, to the other.

The rest of the court concurred.

Rule absolute.

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BARTRAM and another v. TOWNE and others, deforciant.

Tuesday, Feb. 7.

A fine is passed of thirty acres of land, twelve acres of meadow, and twenty-five acres of pasture;—in the deed to lead the uses the estate is described as consisting of thirty-five acres in the whole. The court refused to amend the fine by increasing the quantity of each species of land, so as to make each cover the whole quantity intended to be conveyed.

MR. Serjt. *Blosset* moved that this fine might be amended, by inserting forty acres of land, forty acres of meadow, and forty acres of pasture, in the room of thirty acres of land, twelve acres of meadow, and twenty-five acres of pasture. It appeared by the deed to declare the uses, that the estate intended to be conveyed consisted of one close, containing twenty-five acres, two roods, and thirty-six perches, more or less; and of another close or meadow, containing nine acres, three roods, and twelve perches, more or less; making, together, about thirty-five acres. The object of the amendment now prayed for, was to increase the quantity of each particular description of land, so that each species might cover the whole of the land intended to be conveyed; lest hereafter any mistake should arise, by part of the land changing its condition. The fine was only levied last term.—Mr. Serjt. *Blosset*

observed, that it was usual to insert a greater quantity of land under each description, than that which was intended to be conveyed; the question, therefore, was, whether that which might originally have been done, might not still be done, without putting the parties to the expense of a new fine.

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Lord Chief Justice GIBBS.—If we were to allow this amendment, we must lay it down as a general rule, that wherever a fine does not cover all the land mentioned in the deed to lead the uses, it may be amended. We cannot go a step beyond the regular course, merely because it would have been prudent in the parties to have inserted this quantity of land. As to the fine having been passed last term, it makes no difference whether it were passed yesterday, or fifty years ago, if there be a material difference between the fine and the deed.—*Per Curiam*,

Amendment refused.

GREEN v. THE ROYAL EXCHANGE ASSURANCE COMPANY.

Thursday,  
February 9.

THIS was an action on a policy of insurance on the freight of the ship *Defiance*, at and from the *Canary Islands* to *London*. At the trial of the cause at *Guildhall*, at the sittings after last *Michaelmas* term, before Lord Chief Justice *Gibbs*, it appeared that the ship sailed with a cargo on board, from *Fuertaventura*, one of the *Canary Islands*, on the voyage insured; but that, in consequence of damage occasioned by bad weather, she was obliged to

Freight is insured from *A.* to *B.*—The ship sails, but is obliged to put back from stress of weather, when she is found to be incapable of complete repair, and the cargo is accordingly unloaded, and the ship sold.—In

an action on the policy for a total loss;—*Held*, 1st, that there was no necessity for an abandonment of the freight:—but 2dly, that the insured was bound to use all reasonable endeavours to repair the ship, so as to have carried the cargo, or part of it, which would have operated as a salvage.

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put back to *Lanzarote*, where it was found necessary to unload and sell the goods, the ship not being in a fit state to proceed on her voyage; that the ship was surveyed and sold; that the purchaser, having repaired her in the best manner of which she was capable, brought her to this country with a cargo as large as she was able to carry, but less by one half than her original cargo; and that the captain of the *Defiance* bought another vessel, which he also brought to this country, but without any of his original cargo. The *Solicitor General*, on the part of the defendants, made two objections; *first*, that there ought to have been an abandonment, in support of which objection he cited *Parmer v. Todhunter (a)*, which was an action for a total loss on a policy on freight, the ship having been captured, and recaptured, and sold with her cargo:—Lord *Ellenborough* held, that there should have been an abandonment of the freight, because the goods might have been brought home in another ship, by which means the freight would have been earned. The *Chief Justice*, however, was of opinion, that there was no foundation for this objection; his lordship observed, that he could not understand what there was to be abandoned; that when the freight of a ship was insured, as soon as the cargo was put on board, it became an insurance on that cargo; that in the present case, the cargo had been sold, on account of the inability of the ship to carry it home; and that nothing, therefore, remained to be abandoned (*b*).—The *second* objection made by the *Solicitor General* was, that, at all events, the plaintiff could only recover as for a partial loss; or that, if it were to be considered as a total loss, it

(a) 1 Camp. 541.

(b) See *Marshall on Insurance*, c. 13. s. 4. 2d. edit. and *Thompson v. Rowcroft*, 4 East. 34, *Leatham v. Terry*, 3 B. & P. 479., and *M'Curthy v. Abel*, 5 East. 288, there cited.

should be with benefit of salvage to the underwriters. He contended that the captain of the *Defiance* ought to have done what, in fact, was done by another person; that is, he should have repaired the ship, so as to have brought home part of the cargo; or else he should have hired another ship for that purpose, by which means there would have been a salvage of so much of the freight.—In support of the latter objection, he cited *Evertb v. Smith* (a), where the court of *King's Bench* held, that an insurance on freight, though the ship be chartered to receive freight from a particular person, was not an insurance on that specific cargo particularly, but on any cargo which the ship might bring home; and that where a ship loses her first cargo, and provides a fresh cargo from another person, by which she earns freight, the insured have no claim upon the underwriters.—There was a verdict for the plaintiff, with liberty to the defendants to move for a nonsuit on the first ground, or a new trial on the second.—A rule *nisi* having been accordingly obtained,

Mr. Serjt. *Lens*, and Mr. Serjt. *Vaughan* now shewed cause.—As to the *first* objection, they observed that there was no specific or tangible thing to be abandoned, or which, with reference to the *second* question, could be made the subject of salvage; that freight was only something which was in a course of being earned by the prosecution of the voyage, and which vanished altogether, if the voyage were not performed. There might be an abandonment of a ship or goods, in however damaged a state, because something still existed,—still survived the damage;—but the failure of the voyage prevented the freight from ever accruing. They said that, before the incidental decision which had been cited from 1 *Campbell*, it

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had never been considered that freight was capable of abandonment; and in that case, the question was never put in a course of argument, nor was it to be considered as having been absolutely decided. They cited 2 *Marshall* on *Insurance*, 2d. ed. 562, where abandonment is said to be confined to the cases of capture, shipwreck, stranding, arrest of princes, or *the entire loss of the effects insured*;—which latter words are construed, by *Valin*, to mean, not an absolute destruction, but a *general* loss;—by *Potbier*, to mean a total, or *almost* total loss. All that could possibly be meant by an abandonment of freight was, that notice should have been given to the underwriters of the loss, in order that they might, if they chose, have hired another ship to bring the cargo home; but they contended that there was no such duty imposed upon the insured.—With respect to the *second* objection, that it was the duty of the insured, or the captain, to have procured another ship, they contended that they were not called upon to do so, either by law, or by their original engagement. It might as well be contended that the captain was bound to bring home the cargo, though ten ships should have been necessary for that purpose. [Lord Chief Justice *Gibbs*.—The underwriters contend that the captain should at least have repaired the vessel, so as to have brought home in her as much as actually was brought in her.] That, they contended, was going still further; for that would have been converting the ship into a vessel of a different description, and wholly altering the relation between the parties. Suppose the captain had attempted to repair the ship, and had failed in that attempt; the underwriters would have disavowed this proceeding, and would have contended that the captain had no right to attempt the repair of a ship, which never could be thoroughly repaired, or to run the risk of bringing home the cargo in a ship which was not sea-worthy. The case

of *Everib v. Smith*, they contended, was inapplicable to the present case.

The *Solicitor-General*, *contra*, insisted that if the court should be of opinion that his first objection was not a sufficient ground for a nonsuit, at all events, the defendants would be entitled to a new trial on the second point. It often happened, he said, that freight was earned to a certain extent, *pro rata itineris*, the ship having performed part of her voyage; that then another ship was procured, at the place where the damage happened, to perform the remainder of the voyage; and though the demand for the remainder of the voyage might exceed the rate of the original freight, still a certain proportion would be earned on the whole of the voyage. It had been urged on the other side, that, as the insurance was on the freight of the specific cargo which was first put on board, it was not incumbent on the insured to bring home any other cargo, by way of salvage:—He contended, however, that the change of cargo would make no distinction in this respect. If the plaintiff's argument were just, the captain might have brought home a cargo less liable to damage than the original cargo, and his owner would have received the freight so earned, and would have been also entitled to recover against the underwriters, the amount of the freight supposed to have been lost.

Lord Chief Justice GIBBS.—The court are of opinion that there is no ground for saying that there should have been an abandonment in this case;—but they think that the case should be reconsidered on the second ground. If the ship had brought home another cargo, that would have been a salvage on the original freight; for though, when the cargo was taken on board, the insurance was on that specific cargo; yet, if the ship, having been driven back to her original port of lading, had taken

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another full cargo on board, at a lower freight, the plaintiff would only have been entitled to have recovered the difference.—So, if the ship had been repaired sufficiently to bring home a smaller cargo, that would have been a salvage out of what she would have earned, had the voyage been prosperous. I think the insured ought to have acted as if the adventure had not been insured; and if a man of common prudence would have repaired her for his own advantage, not being insured, he should have done so on account of the underwriters; otherwise, he would have been selling the ship, for the purpose of throwing the loss on the underwriters. The case, therefore, should go to another jury, to consider whether, in point of fact, the ship was sold for that purpose; or whether the plaintiff, or his agent, pursued the same course as if he had not been insured, in which case he would be entitled to recover as for a total loss.—The only point, to which my attention was directed at the trial, was the question of abandonment.—*Per Curiam*,

Rule absolute for a new trial.

Saturday,
 Feb. 11.

ROWLITT and MARRIOTT, plaintiffs, v. ORLEBAR, defendant.

Fine amended by inserting a parish, according to the deed to declare the uses, dated subsequently to the fine.

MR. Serjt. *Blisset* moved for leave to amend this fine, by inserting the words '*Earl's Barton*.'—The fine was levied in *Hilary* term, 1767, for estates in certain parishes in the county of *Northampton*. By the deed to declare the uses, which was dated the 4th of *July* following the date of the fine, a piece of land in the parish of *Earl's Barton* was conveyed, which parish was omitted in the fine. [The court inquired whether a fine could be amended by a deed which was of a subsequent date?] He

observed that in the case of recoveries, the deeds were generally to *lead* the uses; that is, they preceded the passing of the recoveries;—in the case of fines, the deeds more usually were to *declare* the uses; that is, they were made subsequently to the passing the fines.—On the authority of 1 *Ld. Raymond* 209, and 4 *Taun.* 257, where the court amended fines by deeds to *declare* the uses,

The amendment was granted.

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SMITH and others v. MERCER and another.

Monday,
 Feb. 13.

THIS was an action for money had and received, and was tried at *Guildhall*, at the sittings after last *Michaelmas* term, before Lord Chief Justice *Gibbs*, when a verdict was found for the plaintiffs for £120 damages, subject to the opinion of the court upon the following case.

The plaintiffs were bankers in *London*, under the firm of *Smith, Payne and Smiths*; and *Matrice Evans*, hereinafter mentioned, kept cash with them as his bankers. The defendants were bankers at *Tunbridge*, under the firm of *Mercer, Barlow and Co.*, and were *bonâ fide* holders, for a valuable consideration, of a bill of exchange, paid to them by *Peter Le Souef*, which, when it came to their hands, ap-

payment. *A. and Co.* pay it, and send it on the 30th of *April* to the supposed acceptor, who disavows it. *A. and Co.* immediately give notice of the forgery to *B.*, and demand repayment, which *B.* refuses. All parties are ignorant of the fraud.—*Held*, that *A. and Co.*, by paying the bill without ascertaining that the acceptance was genuine, were precluded from recovering the amount from *B.*

A bill of exchange with a forged acceptance, purporting to be payable at the house of *A. and Co.*, bankers in *London*, with whom the supposed acceptor keeps cash, is indorsed to *B.* for a valuable consideration. *B.* indorses it to his agent in *London*, who presents it on the 23d of *April*, at the house of *A. and Co.* for

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peared to be drawn, accepted, and indorsed as follows:—
 £120. *Bermondsey, 15th Feb. 1814.*

Sixty-five days after date, pay to myself or order
 one hundred and twenty pounds, which place to my
 account.

Thomas Temple.

*Maurice Evans, Esq., navy agent,
 George St. Adelphi, London.*

The acceptance was in these words: ‘*Smith, Payne and
 ‘Smiths,—Maurice Evans;*’ and the bill was indorsed by
Thomas Temple, and Peter Le Souef.—The acceptance by
Maurice Evans was forged. Before the bill became due,
 the defendants indorsed and sent it to Messrs. *Spooner and
 Co.*, their corresponding bankers in *London*, to be received
 for them at maturity. The bill was accordingly presented
 by *Spooner and Co.* to the plaintiffs for payment, on the 23d
 of *April*, the day on which it became due, and the latter
 immediately paid the account to *Spooner and Co.*, who paid
 it over to the defendants.—All the parties were, at the
 time, equally ignorant of the forgery. The plaintiffs sent
 the bill at the usual time, with other vouchers of payments
 made for him, to *Maurice Evans*, who immediately re-
 turned the same to them as forged, and refused to allow
 the payment thereof, as a payment made on his account.
 The plaintiffs, on discovering the forgery, gave notice
 thereof to the defendants, on the 30th of *April* 1814, and
 required them to repay the amount of the bill, which they
 refused to do.—The question for the opinion of the court
 was, whether the plaintiffs were entitled to recover: If they
 were, the verdict was to stand; if not, a nonsuit to be
 entered.—The case was argued, on a former day in this
 term, by Mr. Serjt. *Lens* for the plaintiffs, and Mr Serjt.
Best for the defendants.

Mr. Serjt. *Lens*, on the part of the plaintiffs, contended

that they were not precluded, by having innocently paid that which the bill purported to be worth, from recovering it back from the person to whom they had paid it ; for, by so paying it, they had given no additional validity to the instrument. The general subject, he said, had been discussed in the cases of *Jones v. Ryde*, and *Bruce v. Bruce (a)*, the latter of which cases was more immediately applicable to the present, because there, as in this case, the bill was actually paid. [Lord Chief Justice Gibbs.—But in that case, the court did not determine that the victualling office would have been entitled to recover; the case did not involve that question.] The case of *Price v. Neale (b)*, he said, would be pressed as the main ground of the defendants argument, but it was very distinguishable from the present. In that case, the plaintiff had admitted the bills to have been drawn upon him by his correspondent ; for he actually accepted one of them, and paid the other, on receiving notice that it was drawn upon him ; the question, therefore, could not be permitted to arise between him and other persons :—He had admitted the hand-writing of the drawer, and had no right, on discovering the forgery, to throw the loss on the defendant, who had not the same means of satisfying himself as to the validity of the instrument. In the present case, on the contrary, there had been in fact no acceptance of the bill. The bill purported to be drawn on *Evans*, who, it was true, kept cash with the plaintiffs ; but it was never presented to them, so as to give them an opportunity of ascertaining whether it were genuine or not : It had been merely brought to them for payment, and they had paid it in the common course of business.

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(a) *Ante* 157,—165.—(b) 3 *Bur.* 1354. 1 *Bl.* 390. *S. C.*

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No one had taken it on the faith of the plaintiff's acknowledgment of its validity, as in the case of *Price v. Neale*. The present case therefore, he contended, fell within the common principle of money having been paid without any consideration, and without any right on the part of the defendants to have recovered it, if it had not been so paid.

Mr. Serjt. *Best*, *contra*, contended that the present case fell within the principle of *Price v. Neale*, and that that case was not shaken by those of *Jones v. Ryde*, or *Bruce v. Bruce*. The plaintiffs, being bankers at whose house the supposed acceptor kept cash, should have known whether the acceptance were really his writing or not, which the defendants had no means of ascertaining; the negligence, therefore, was entirely on the part of the plaintiffs, in not knowing the hand-writing of their customers. The distinction between the present case, and that of *Price v. Neale*, was merely a verbal one: In the latter case, the name of the drawer had been admitted to be genuine,—in the former, that of the acceptor; but there was the same degree of negligence in both cases. With respect to *Jones v. Ryde*, and *Bruce v. Bruce*, the person taking the navy bill gave no sanction to it, nor was he guilty of any negligence in taking it;—whereas, in the present case, the supposed drawee, or at least his agents, had acted upon the bill, and had thereby sanctioned and acknowledged it. The circumstance in *Bruce v. Bruce*, of the victualling office having paid the bill, made no difference; because, as his lordship had observed, the question did not arise, whether the office would have been entitled to recover; and a party was not to be affected by the negligence of third persons. The question, therefore, was, whether the plaintiffs, having acted on a bad bill as if it had been genuine, with the means, too, of ascertaining its validity; and having kept it by them for the space of a

week, were entitled to recover the amount from the defendants, to whom no negligence was imputable.

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Mr. Serjt. *Lens*, in reply, observed that negligence was not the only test on which these cases were to be decided; but he contended that in the case of *Jones v. Ryde*, less attention would have been sufficient to discover the forgery than in the present instance, because in the former case, the sum, as it appeared in figures, must have differed from the sum in the body of the instrument. As to the circumstance, that the plaintiff had kept the bill for seven days, the reason was, that the forgery was not detected till after that time had elapsed; and the defendants had not been prejudiced by that delay; for they were exactly in the same situation, as if the discovery had been made immediately.—He would not, he said, enter into the other cases on the subject, as they had been discussed in the case of *Jones v. Ryde*. The only question was, whether the present case fell within the principle of *Price v. Neale*, or that of *Jones v. Ryde* and *Bruce v. Bruce*; or whether it were not rather a sort of middle case between them.

The court took time for consideration, and on this day, Mr. Justice *Chambre* differing from the rest of the court, the judges delivered their opinions *seriatim*.

Mr. Justice DALLAS, after stating the circumstances of the case, proceeded thus.—It is agreed that, in this case, all the parties were equally innocent; and the question is, on whom, under all the circumstances, the loss should fall. The case of *Price v. Neale*, though it is not, in all respects, exactly the same as the present, yet furnishes, I think, a rule which should govern the present case, independently of general principles, on which it may be decided. In the case of *Price v. Neale*, the parties were equally innocent, and equally ignorant of the for-

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gery, as in the present case ; and the plaintiff's argument there, also, was, that the money had been paid by mistake. Looking at the judgment of the court in that case, it is necessary to discriminate between the general doctrine, and the precise ground on which that case was decided. The plaintiff's neglect was the ground on which that case was determined, and that neglect consisted in admitting the handwriting of the drawer :—Now, if it be the duty of an acceptor to know the handwriting of the drawer, it is equally the duty of a banker to be acquainted with the handwriting of his customers, which he has an opportunity of seeing every day. In the present case, the bill having been made payable at the house of the plaintiffs, it is the same thing, for the purpose of my argument, as if it had been drawn upon them ; and I therefore consider the payment of it as a want of due caution on the part of the plaintiffs, and that, if the case of *Price v. Neale* be considered as an authority, the money can never be recovered back. In order to distinguish the two cases, it has been said that this payment on the part of the plaintiffs, added nothing to the negotiability of the instrument ; as to which it is to be observed, that the case was the same, with respect to one of the bills, in *Price v. Neale* ; and yet the court held that the plaintiff was not intitled to recover on it. It is also urged in the present case, that no injury has accrued to any of the parties by this payment ; now, if the bill had not been paid, there would have been an immediate return of it, whereas the effect of the delay which took place has been to give the instrument an extended credit from the 23d, to the 30th of *April*. How then is it to be said that the situation of the parties has not been altered ? Without, therefore, considering in what way these parties should have acted, in order to have discharged them-

selves; confining myself to the ground of negligence, I am of opinion that the plaintiffs are not entitled to recover.

Mr. Justice CHAMBRE.—I am of opinion that the plaintiffs are entitled to recover in this action. The plaintiffs, who had received the bill for a valuable consideration, gave notice to the defendants of the forgery, as soon as they had an opportunity. The present action is brought on the general principle, that where money is paid by mistake, it may be recovered back. The bill was paid by the plaintiffs, under a representation that it was by the acceptor's desire; for the indorsement by the defendants amounted, in fact, to such representation. The exceptions to the general rule occur, almost exclusively, in the case of bills of exchange, where the application of it might be productive of great inconvenience. In the case of *Jenys v. Fowler* (a), which was alluded to in *Price v. Neale*, the acceptor was not permitted to set up the forgery of a bill as a defence, on account of the danger which might accrue therefrom to negotiable notes; and on the authority of that case, the plaintiff in *Price v. Neale*, according to *Blackstone's* report of the case, gave up his claim as to the accepted bill. Mr. Justice *Blackstone* has jumbled the cases of the two bills together, and he says that there was a greater degree of negligence in the plaintiff than in the defendant;—this, however, is an odd subject of calculation. He goes on to say, 'that one innocent man must not relieve himself, by throwing the loss on another.' So, in the present case, I should say that the defendants must not be permitted to throw the loss on others, who are equally innocent with themselves, and who have not given the appearance of authenticity to the instrument, as the de-

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(a) *Str.* 946.



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defendants have done. The report in *Burrow* is ~~more~~ a length, and contains some flourishing about the defendant's conscience in an action for money had ~~and~~ received:—I cannot very well understand the ~~conscience~~ of a man who keeps possession of money to ~~which~~ he has no claim, merely because he obtained it ~~without~~ fraud. That case was cited in *Jones v. Ryde*, and I think the doctrine contained in it was, on that occasion, in a great measure rejected by the court. Lord C. J. Gibbs, in delivering his judgment, ~~observed~~, 'that if a man pass an instrument of 'this kind without indorsing it, he cannot be sued as 'indorser, but that he is not released from the responsibility which he incurs, by passing an instrument, which 'purports to be of greater value than it really is.' His lordship also said that it was not disputed that, 'if a man 'took a forged note, he was entitled to recover the 'amount of it.'—Then the case of *Bruce v. Bruce* is still stronger, because the office which issued the bill ought certainly to have known whether the instrument were valid or not; and yet the court could not distinguish it from the case of *Jones v. Ryde*. In the present case, it has been insisted that, whatever might have been the plaintiffs' original claim, they have lost it by their own negligence; they, however, had no idea of the forgery, nor any means of discovering it. When the supposed acceptor received the bill, he could not be deceived by the forgery, because he knew that he had had no transactions with the parties; and he therefore immediately sent word to the plaintiffs, and they gave notice to the defendants. Where then is the negligence? The bill 'was *functus officio* as to the plaintiffs, and there seems to me, therefore, to be no colour of reason for throwing the loss on the plaintiffs, on the ground of negligence. A strong argument in their favour is, that they were no parties to the bill; neither drawers, nor acceptors, nor

indorsers :—They were merely the servants and agents of the supposed acceptor, and they paid the bill, on the representation that it was at his request. It was therefore merely a payment of money under a supposed authority which did not exist, and it does not affect the negotiability of these instruments in any respect. I am, therefore, decidedly of opinion, that the plaintiffs are entitled to recover.

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Mr. Justice HEATH.—I am of opinion that a nonsuit should be entered in this case. I admit that the money was paid without consideration, and that, if there were no peculiar circumstances in the case, it would fall under the principle of *Jones v. Ryde*, and *Bruce v. Bruce*. But I think there are circumstances in the present case, which distinguish it from those mentioned. There is no doubt but *Evans* himself would have been concluded, if he had paid the bill; how then can his agents be in a better situation than himself? As between *Evans* and the plaintiffs, the question would be different; but as between the plaintiffs and the rest of the world, the plaintiffs are liable. The situation of the plaintiffs is particular in another respect; for in the character of bankers, they must be considered as professing to know the handwriting of all their customers; and if they be ignorant in that respect, it is their neglect, and they ought to sustain the loss which has happened in consequence of that neglect.

Lord Chief Justice GIBBS.—I concur in opinion with my brothers *Heath* and *Dallas*. It is not necessary for me to go at large into the general reasoning of the case, which has been so ably stated by them. The narrow ground, on which I shall found my opinion, is, I think, conclusive. At the time when the defendants came into possession of the bill, if the acceptance had been genuine, they would have had their remedy, either against the

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acceptor, or against the drawer. The acceptance carried an order with it, from the supposed acceptor, on his bankers to pay it. It was incumbent on the plaintiffs to look at the validity of the acceptance before they paid it; and if they did not, the loss ought to fall upon them, and not upon those who were in no way to blame. But let us consider whether the defendants were not prejudiced, by the delay on the part of the plaintiffs, in their remedy against the other parties to the bill. The bill became due on the 23d of *April*, on which day, the defendants, through the medium of their agents, applied to the plaintiffs for payment, who immediately complied, and the money remained in the hands of the defendants, till the 30th of *April*, when the plaintiffs applied to them for repayment. If the plaintiffs had objected to pay the bill, the defendants would have resorted to the supposed acceptor, and afterwards to the drawer; whereas, by receiving the money, they were precluded from giving notice of the dishonour, for in fact the bill had not been dishonoured. When they did receive notice of the forgery, it was too late to resort to the drawer, because he was entitled to notice as soon as possible after the dishonour, and in default of such notice he was discharged. By whose neglect, then, was he discharged? Not by the defendants' neglect, because they could not give notice while the money remained in their hands; but by that of the plaintiffs, in paying the money without proper scrutiny, by which means, the defendants have been deprived of the remedy which they otherwise would have had. I have put the case simply on this narrow ground, that by the payment from the plaintiffs to the defendants, the latter have been put in a situation of disadvantage which otherwise they would not have been in:—But in so deciding it, I am far from disavowing the larger ground on which the case has been put by my brothers *Heath* and *Dallas*;

I only think that the more confined view which I have taken of the question is sufficient to decide it.

Judgment for the Defendants.

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TREMAIN and another v. BARRETT.

Monday, Feb. 13.

MR. Serjt. *Vaughan* moved that it might be referred to the prothonotary to review his taxation of the plaintiff's costs, so far as related to his allowance of the sum of £140, for the expenses and loss of time of a witness for the plaintiffs, on the trial of this cause. The facts of the case, as appeared by the affidavit of the plaintiff's attorney, were, that the plaintiffs, who resided at *Halifax*, had supplied a ship belonging to a Mr. *Faith*, with stores, at the request of the present defendant, who was captain of the ship; that the defendant drew bills upon *Faith*, in favour of the plaintiffs, in payment, which *Faith* refused to accept; that the plaintiffs commenced an action against *Faith*, and sent to *Halifax* for a witness to support that action, which would have been ripe for trial at the sittings after last *Michaelmas* term; that before the commencement of that term, the present defendant arrived in *England*, when the plaintiffs arrested him as drawer of the bills; that issue having been joined in this cause about the 26th of *November*, it was agreed to stay proceedings in the action against *Faith*, on condition that the present defendant would accept notice of trial for the sittings after *Michaelmas* term.—That the witness in question came over from *Halifax*, for the express purpose of supporting the demand for which this action was brought; and that, upon his evidence, a verdict was obtained, at *Guildhall*, on the 14th of *December* last.—Upon these facts, the protho-

*A.* abroad furnishes goods to *B.* at the request of *C.*, who draws bills on *B.*, payable to *A.*, which *C.* refuses to accept. *A.* sends for a witness from abroad for the support of an action against *B.*, pending which action, *C.* arrives in this country. *A.* then discontinues his action against *B.*, and commences another against *C.*, in which he recovers, by means of the witness he had brought from abroad:—*Held*, that *C.* is only liable for the costs of the witness while detained in this country, and not for those of bringing him over or of sending him back.

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notary considered that the plaintiffs were entitled to the expenses incurred by detaining the witness in this country, and sending him back again; but that, as he arrived here before the action was commenced, they were not entitled to the expense of bringing him over.—Mr. Serjt. *Vaughan* contended that, where a witness was brought from abroad before the action was commenced, the plaintiff was not entitled to any of the costs incurred by that witness, even though the action could not be maintained without him; in support of which position he cited *Schimmel v. Lousada* (a). [Lord Chief Justice *Gibbs*.—The decision in that case was, that if a plaintiff send for a witness in order to ascertain whether he have a good cause of action, and examine him here, his expenses in coming and returning will not be allowed.] He contended that, under the peculiar circumstances of this case,—the action, for the support of which the witness had been brought, having been discontinued,—the present defendant was no more liable for the costs of sending him back to *Halifax*, than he was for those of bringing him over; and that as to the costs of detaining him here, the defendant should, at all events, bear but one half of them. [Lord C. J. *Gibbs*.—How can we allow half the expense of keeping him here?—That is a thing which has never been done.]

Mr. Serjt. *Blosset* shewed cause in the first instance. The question, he said, was, whether a plaintiff, wishing to expedite his cause, and to avoid the extreme inconvenience of sending for a witness from the other side of the globe, between the time of suing out the writ and of the trial, were not justified in sending for him before the commencement of the action, and entitled to his costs occasioned by so doing. The case, he observed, was new in this court, and was very distinguishable from that of

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(a) 4 Tass. 695. See also *Sturdy v. Andrews*, *ib.* 697.

*Schimmet v. Lousada*, where the witness was sent for, by way of experiment, to ascertain whether the action could be supported :—In the present case, the plaintiff sent for him, knowing that he had a good cause of action ; and it appeared by the affidavit that the witness was material in the cause. The circumstance of the writ having been sued out before the witness was sent for, provided he were sent for with a view to the action, could make no difference. It might as well be given as an answer to a demand for costs, that the declaration, or any other proceedings, had been prepared before the writ was sued out :—The only question would be, whether the costs were necessary, and had been incurred with a view to the ultimate trial of the cause. So, by analogy, the question here was, whether the witness had been sent for with that view. He said he was supported in his argument, by the practice in the court of *King's Bench*, by which a witness, who was sent for and arrived in this country before the writ sued out, would be allowed the reasonable expenses of his passage hither, and back ; and of his maintenance here for such time as, under all circumstances, should appear reasonable.

Lord Chief Justice GIBBS.—The facts of the present case are, that the plaintiff having expended money on behalf of *Faith*, on the application of *Barrett*, the present defendant ; *Barrett* drew bills in favour of the plaintiff on *Faith*, who, however, refused to accept them. The plaintiff then determined to sue him, as for money paid, or goods delivered, on his account ; and accordingly sent for a witness from *America* to prove that debt ; for no action could be brought against him as drawee of a bill of exchange, which he had refused to accept. The plaintiff, however, having brought an action against *Barrett*, as drawer of the bills, he uses as a witness in that cause the person whom he had brought over, not with a view to an

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action against *Barrett*, but for the purpose of proving a debt against *Faith*.—It was merely accidental that the present defendant was in this country; the witness, therefore, was not only sent for before the action was commenced, as in the case of *Schimmel v. Lousada*, but he was brought over for a different purpose. There is no ground, therefore, for charging the defendant, either with the expenses of bringing him over, or with those of sending him back; but I think the plaintiff should be allowed the reasonable expenses incurred by the witness, from the commencement of the action, for a reasonable time, until he can leave this country:—That is according to the decision of Lord C. J. *Mansfield* in *Schimmel v. Lousada*.

The rest of the court concurring, the rule was made absolute, according to his lordship's judgment.

END OF HILARY TERM.

# CASES

ARGUED AND DETERMINED

IN THE

**Court of Common Pleas,**

IN

*EASTER TERM,*

IN THE

FIFTY-FIFTH YEAR OF THE REIGN OF GEORGE III.

VOL. I.

KK



1815.

Friday, April 14.

PAYNE and another, plaintiffs, and GARRICK and wife,  
deforciantes.

A fine may be amended, by striking out the names of the parishes, in which the lands were erroneously described to be situated;—those lands being extra-parochial.

THIS fine was levied in pursuance of marriage articles, in which the lands intended to be settled were described as ‘certain fenny lands, and marsh grounds, and hereditaments, containing by estimation 450 acres, or thereabouts, part of 500 acres lying and being in *Byal Fen*, being part of the 1000 acres described in the lot book of the corporation of the adventurers of the great level of the fens, called *Bedford Level*, *Byal Fen*, next to *Maney*, No. 29, and situate in the parishes, bounds, and territories of *Chatteris*, *Maney*, and *Coveney*, or one of them, in the Isle of *Ely*, in the county of *Cambridge*.’ In the fine, the lands were described as ‘500 acres of land, and 500 acres of fen, with the appurtenances, in *Chatteris*, *Maney*, and *Coveney*, in the Isle of *Ely*.’ It appeared that *Byal Fen* was extra-parochial, and was known by the name of *Byal Fen*, as a distinct and separate district of itself.

Mr. Serjt. *Vaughan* now moved to amend the fine, by expunging the words ‘in *Chatteris*, *Maney*, and *Coveney*,’ by which it would seem that the lands were situated in those parishes, and inserting the words ‘in *Byal Fen* next *Maney*,’ and the court, on the production of an affidavit, verifying the above particulars,

Allowed the amendment.

## STEVENS v. JACKSON and others.

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Saturday,  
April 15.

THIS action was brought to try the validity of a commission of bankrupt, which had issued against the plaintiff, and was tried before Lord Chief Justice *Gibbs*, at the sittings after last *Hilary* term, at *Guild-Hall*, when a verdict was found for the defendants, the assignees under the commission. The point intended to be contested was the act of bankruptcy, which was alleged to consist in the plaintiff's having been arrested, and having lain in prison more than two months. It appeared that a warrant had issued from the sheriff of *Middlesex*, directed to *Wubers* and *Weldon*, two of his officers, by virtue of which, *Weldon*, on the 27th of *August*, 1814, went to the plaintiff's house for the purpose of arresting him;—that, finding him in his bed, dangerously ill, and incapable of being removed, *Weldon* left him in the care of a follower, who was not named in the warrant;—that the plaintiff remained in custody, in his own house, from the 27th of *August* to the 3d of *September* following, the bailiff's follower having the key of the house in his possession;—that, on the 3d of *September*, the plaintiff was carried to a lock-up house;—and that the commission issued on the 28th of *October*.—The *Solicitor-General*, on the part of the plaintiff, contended that, as the sheriff's officers, to whom the warrant was directed, could not delegate to a follower their authority to arrest the plaintiff, so neither had such follower a right to detain the plaintiff at his own house; and that, therefore, the detention from the 27th of *August* to the 3rd of *September* was not a *lying in prison*, within 21st *Jac.* 1st, c. 19(a). The Chief Justice,

A person is arrested by virtue of a warrant directed to a sheriff's officer, but on account of illness, is permitted to remain a few days in his own house, in the custody of the officer's follower, who is not named in the warrant, but who keeps the key of the house in his possession;—he is then removed to gaol, where he continues for the remainder of two months:—*Held*, that this is a legal imprisonment, so as to constitute an act of bankruptcy.

(a) The words of the act are, 'Any person, who, being arrested for debt, shall, after his or her arrest, *lie in prison* two months, or

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however, was of a contrary opinion: His Lordship considered that the imprisonment intended by the act was a *legal confinement*, and that the detention of the plaintiff at his own house fell within the meaning of it.

The *Solicitor-General* now moved that the verdict should be set aside, and a new trial granted. He said it was not sufficient that there had been a legal arrest; it was necessary that there should be a *continued* and *legal* custody, in order to constitute an act of bankruptcy. He cited *Benton v. Sutton (a)*, where this court held, that, if a sheriff's officer, having taken a prisoner in execution, permit him to go about with a follower, before he carries him to prison, it is an escape;—and Lord C. J. *Eyre*, in giving judgment, observed 'that the custody of the follower, after the writ once executed, amounted to no thing:—That he could have had no power to detain the prisoner if he had chosen to escape; and that the warrant would have been no justification to him if any mischief had happened.'—There might be instances, where humanity would require that the prisoner should not be removed from the place of his apprehension; but, in such case, he should be left in the custody of some person who was lawfully authorized to detain him.

Lord Chief Justice GIBBS.—If this were so, the consequences would be most extraordinary; for it might as well be said that a detention in an officer's house is an escape out of custody. Unless the plaintiff can shew that, by the word *prison*, the act meant the county gaol, and that nothing but a public prison will satisfy the intention of the legislature, I must think that he never was out of legal custody.

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' more, upon that or any other arrest or detention in prison for debt.'

(a) 1 B. & P. 24.

Mr. Justice HEATH.—Where a prisoner is taken in execution, the officer is only bound to carry him to prison within reasonable time. There is nothing in the objection.

The rest of the court concurred.

Rule refused.

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ROGERS v. DALLIMORE.

Mr. Serjt. *Best* shewed cause against a rule, which had been obtained by Mr. Serjt. *Lens*, calling on the defendant to shew cause why the award, which had been made in this cause, should not be set aside, or be referred back to the arbitrator to be reconsidered by him. The cause was referred by consent under a judge's order, dated the 11th of *May*, 1814, and the arbitrator made his award on the 21st of *July* following. The present application, which was founded on the acknowledgment of the arbitrator, that more was due to the plaintiff by £20 than he had awarded him, was not made till towards the latter end of last *Hilary* term; which Mr. Serjt. *Best* contended was too late, under stat. 9 and 10 *W. 3.*  
c. 15. s. 2. (a).

The question, he said, was, whether that statute ex-

Monday,  
April 17.

The limitation of time, prescribed by the 8th and 9th of *W. 3d.* for applications to the court to set aside awards, applies only to cases where an original authority is given to the court by that act;—and though the court will, in general, adopt the same rule in cases where their authority existed independently of the act; yet, where they see sufficient reason for their interference, they will interpose their authority, though the time prescribed should have elapsed.

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(a) By that section it is enacted, 'that any arbitration or umpirage, procured by corruption or undue means, shall be judged and esteemed void and of none effect; and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made, in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term, after such arbitration or umpirage made and published to the parties.'

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tended to awards made in pursuance of a judge's order. He contended that it did, and cited *Zachary v. Shepherd* (a), where the court held, that this motion must be made before the last day of the term, next after the award made; though the award be not procured by corruption or undue means. It did not distinctly appear that the reference in that case was by a judge's order, but from the circumstances of the case, it was to be presumed that it was so. He was aware, he said, of a later case of *Synge v. Jervoise* (b), on which the other side would rely, and where it was decided that the limitation of the statute did not extend to awards made under orders of *nisi prius*. The present award, however, he observed, was not made under an order of *nisi prius*, and he contended, therefore, that the court had no authority to set aside this award, except under the statute; and that, then, the limitation of that statute interposed. [Lord Chief Justice Gibbs. The distinction on which the other side will rely, is, between cases where the reference is entered into by the original agreement of the parties,—the court not being in possession of any cause between them,—in which case the court could not interfere, except under the statute; and those cases where the aid of the statute is not necessary to give the court authority. It will be contended that the limitation of the statute applies only to the former cases, though I think the practice has been to extend it to both cases.]

Mr. Serjt. *Lens*, *contra*, insisted that the court did not derive their power of setting aside awards from the stat. of *W. 3.*; that power had always resided in them, and the act only imposed a limitation in particular cases. He observed that the case of *Synge v. Jervoise* was not decided

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(a) 2 T. R. 781.—(b) 8 East. 466.

as an exception to a general rule, but as following from general principles, and in recognition of the case of *Anderson v. Coxeter* (a), where the court held that the statute extended only to cases where the submission was by obligation:—and this, he said, was the true ground, for there was no substantial distinction between cases where the submission was by order of *nisi prius*, or of a judge at chambers, or in any other way in the progress of a cause.—[Lord Chief Justice *Gibbs*.—Another question is, whether, in those cases, where the court has a discretionary power, they will not pursue the same course, as where the line to be adopted is prescribed to them.] The court, then, he said, would look to the particular circumstances of the case; the present application was made by the plaintiff in his own delay, in order to obtain that which the arbitrator admitted to be due to him.

Lord Chief Justice *GIBBS*.—The court by no means intend to hold out to parties that applications to set aside awards, where the submission has not been entered into by bond, may be made at any distance of time: On the contrary, the court will, in general, prescribe to themselves the same rule, which the statute has prescribed to them in certain cases. But we think, that the limitation of the act applies only to cases where an original authority is given by it, and not to awards made under the authority of a rule of court; for awards made under an order of *nisi prius* only take effect by the retrospective operation of the rule of court, when made. The only ground on which this application is resisted, is, that unless the court set the award aside by virtue of the statute, they have no authority to set it aside at all:—It is contended that if we proceed on the statute, the application is too late, and that without the statute, we have no jurisdiction.

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(a) 1 S/r. 301<sup>2</sup>

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We are of opinion, however, that where a cause is referred to arbitration, the court still reserves a superintending authority over the award, and in such case it proceeds on that authority. The question, therefore, now is, whether, using that discretion, the court will interpose in this particular case. The merits of the case are out of the question; for the arbitrator says he ought to have awarded £60 instead of £40, and this is a sufficient reason for our interference, though the period to which, in ordinary cases, we should confine ourselves, has elapsed. We proceed on the authority of *Synge v. Jervoise*, founded on that of *Anderson v. Coxeter*. — *Per Curiam*,

Rule absolute.

Wednesday,  
April 19.

SMITH and another v. JOHN PATTEN, sued by the name  
of JOSEPH PATTEN.

Where a defendant is sued by a wrong name, receives notice of declaration, and neglects to appear and plead in abatement; but suffers the plaintiff to sign judgment and execute a writ of inquiry, he cannot afterwards move the court to set aside the proceedings for irregularity.

MR. Serjt. *Best* had obtained a rule, calling on the plaintiffs to shew cause why the interlocutory judgment signed in this cause, and the subsequent proceedings thereon, should not be set aside for irregularity, on the ground that the defendant had been sued by the name of *Joseph*, his real christian name being *John*.

Mr. Serjt. *Vaughan* now shewed cause against the rule on the affidavit of the plaintiff's attorney, which stated that on the 15th of *December*, 1814, he wrote to the defendant a letter in which he demanded the debt, and which he directed to Mr. *Joseph Patten*; that on the 21st of *December* he received a letter from the defendant's attorney, in which the latter stated that 'Mr. *Patten* had directed him to acknowledge the receipt of the former

'letter, &c.;'—that on the 14th of *January* the defendant was served with a writ against him by the name of *Joseph Patten*, and with a notice of declaration on the 27th of *January*; that on the 8th of *February*, the defendant not having appeared, the plaintiff's attorney entered an appearance for him, signed judgment as for want of a plea, and served a notice on the defendant of executing a writ of inquiry on the 6th of *April*, which was executed accordingly; and that on the 8th of *April* he received notice of the present motion.—On these facts, he contended, that the defendant had waived the irregularity in two ways;—*first*, by his attorney having, in his answer to the plaintiff's letter, omitted to correct the mistake into which the plaintiff had fallen; and *secondly*, by having neglected to plead the misnomer in abatement; in consequence of which omission he was now too late to make the objection. He cited *Crawford v. Satchwell* (a), where the plaintiff having brought an action of false imprisonment by the christian name of *Archibald*, the defendant justified under a judgment against *Arthur*, and averred that the plaintiff in the present action was the same person who had been sued by the name of *Arthur*. On demurrer, the court held the plea to be good, the defendant having missed his time for taking advantage of the misnomer, which should have been by pleading it in the former action.

Mr. Serjt. *Best*, *contra*, insisted that this was not a mere irregularity, which was waived by any delay on the part of the defendant to take advantage of it; the action itself was wrong, the proceedings upon it were void, and if the plaintiffs had proceeded to take the defendant in execution, they would have been liable to an action of trespass. There was no obligation on a defendant, he

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(a) 2 Str. 1816.



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said, to plead a misnomer, unless where he had appeared; in support of which position, he cited *Cole v. Hindson* (a), where, in an action of trespass, for taking the goods of *A. B.*, a plea that the defendant took them under a *distingas* against *C. B.* (meaning the said *A. B.*) to compel an appearance, with an averment that *A. B.* and *C. B.* were the same person, was held to be bad, unless *A. B.* had appeared, and had omitted to plead in abatement.

Lord Chief Justice GIBBS.—Leaving untouched that part of the plaintiff's argument which relates to the letter of the defendant's attorney, I am of opinion, that this application comes too late. The defendant, on being served with the notice of declaration, which was on the 27th of *January*, should have appeared and pleaded in abatement, instead of which he suffers the plaintiffs to go on, and does not apply to set aside the proceedings, till the writ of inquiry has been executed.

Mr. Justice HEATH.—It would be productive of great mischief and oppression if a party were permitted to lie by in this manner, instead of rectifying the mistake in the first instance, by pleading in abatement.

Mr. Justice CHAMBRE.—The object of the court is to repress expense and delay; and we should be encouraging both if we made this rule absolute.

Mr. Justice DALLAS concurred.

Rule discharged with costs.

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(a) 6 T. R. 234.

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ARBOUIN v. WILLOUGHBY.

Friday, April 21.

MR. Serjt. *Vaughan* shewed cause against a rule to set aside the proceedings in this cause, on the ground that the defendant was sued by the names of *William Willoughby*, his christian name being *Hans William*. He contended that this was no variance, for the defendant was not called by a different name from his real name.

Proceedings set aside, on the ground that the defendant, having two *Christian* names, is sued by only one of them.

LORD Chief Justice GIBBS, however, observed that this was the same as if the plaintiff had declared against the defendant by the name of *William* only, and the defendant had pleaded in abatement, in which case he would have been entitled to judgment.—*Per Curiam*,

Rule absolute.

TOWNSEND v. SNOW.

Monday,  
April 24.

MR. Serjt. *Blosset* moved for a rule to shew cause, why the proceedings in this action should not be set aside;—or else be stayed until the plaintiff should give security for costs,—on an affidavit which stated that the plaintiff was an insolvent debtor, and had been discharged under the insolvent acts; that he had assigned his property according to those acts, and that the debt, for which the present action was brought, was incurred before the assignment. [The Chief Justice stated that the parties had been before his lordship at chambers, when it appeared that the plaintiff's assignee had refused to bring the present action, on which account it was brought in the name of the insolvent. With respect to the former

Where an insolvent debtor, having assigned his property under the insolvent acts, brings an action to recover a debt incurred before the assignment,—the assignees having refused to sue;—the court will neither set aside the proceedings in such action, nor require the insolvent to give security for the costs.

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part of the motion, his lordship observed that, if the plaintiff were entitled to bring this action, the court would not interfere to prevent him;—if he were not so entitled, that would be matter of defence.] Mr. Serjt. *Blosset* then supported the latter part of his motion on the authority of *Webb v. Ward (a)*, where the court of *King's Bench* required an uncertificated bankrupt to give security for costs, in an action of trover brought by him for the benefit of his assignees.

Lord Chief Justice GIBBS.—In that case, the assignees were suing for their own interest, in the name of the bankrupt;—the present action, on the contrary, was brought because the assignee had refused to sue at all.—*Per Curiam*,

Rule refused (*b*).

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(a) 7 T. R. 296. — (b) In *M'Connel* and another, v. *Johnston*, 1 East. 431, on a motion to compel the plaintiffs to give security for costs, one of them being a foreigner residing abroad, and the other a bankrupt in execution for a debt; the court refused the rule, on the ground that one of the plaintiffs was within the jurisdiction of the court, and within reach of its process, and not coming under any of the rules which required security to be given for costs.—See also 1 *Tidd*, 531, 5th ed.

Tuesday,  
April 25.

BROWN v. ROSE.

The memorial of an annuity, required by stat. 17 G. 3, c. 26, in reciting the indenture, states, 'that for the better and more effectually securing the payment of the said annuity, and, in consideration of 10s. the grantor did grant the said estates, upon the trusts, and to and for the uses, intents, and purposes, therein expressed and declared:—'Held that this was a sufficient statement of the trusts of the demise.—

It is not necessary to state in the memorial the names of the attornies, who are authorized to enter up judgment on the warrant of attorney.—

Where the witnesses to the indenture, and to the warrant of attorney, are the same persons, it is sufficient to state them as witnesses to the former instrument, without repeating their names as witnesses to the warrant of attorney.

And even, if the omission had been fatal to the warrant of attorney, the other parts of the assurance would not have been affected by it.


*Wheate*, Bart., and alleged that the plaintiff held the *locus in quo* as tenant to the said Sir *J. T. Wheate*, at the yearly rent of £300; and that the distress was made for rent in arrear.—To this cognizance, the plaintiff pleaded in bar, first, that one *E. Watts*, clerk, being seised in his demesne as of freehold, in the several places in which, &c., before the said several times when, &c., viz. on the 26th of *November*, 1812, demised to the plaintiff, the said places in which, &c. for the term of twelve years; and that this demise was the same as that mentioned in the defendant's cognizance; that, on the 10th of *June*, 1813, by an indenture made between the said *E. Watts* of the first part, one *C. N. A. Humphries* of the second part, and the said Sir *J. T. Wheate*, of the third part, it was expressed that the said *E. Watts* did grant to the said *C. N. A. Humphries*, for the life of the said *E. Watts*, an annuity of £800, to be paid at the times and in the manner therein mentioned;—and it was by that indenture further expressed, that, for the better and more effectually securing the payment of the said annuity, the said *E. Watts* did thereby grant to the said Sir *J. T. Wheate*, the said several places in which, &c.; to hold the same for the term of 99 years, *upon the trusts, and to and for the uses, intents, and purposes, therein expressed and declared.*—And for better securing the said annuity, the said *E. Watts* did enter into a certain warrant of attorney, which was executed in the presence of, and attested by, one *A. B.* and one *I. G.*;—and that no memorial of the said last mentioned indenture, and the said warrant of attorney, was enrolled in the High-Court of *Chancery*, within twenty days of the execution thereof, except a certain memorial of the tenor and effect following.—The plea then set out the memorial, which was, in substance, as follows:—‘A memorial to be enrolled, &c., of an indenture, dated the 10th of *June*, 1813, between

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‘ *E. Watts* of the first part, *C. N. A. Humphries* of the
 ‘ second part, and Sir *J. T. Wheate* of the third part;
 ‘ reciting that the said *C. N. A. Humphries* had agreed
 ‘ with the said *E. Watts* for the purchase of an annuity
 ‘ of £800, to be secured upon, and payable out of, the
 ‘ rectories of *C.* and *B.*, and the messuages, &c., there-
 ‘ unto belonging, and to be further secured in the man-
 ‘ ner thereafter mentioned, for the sum of £5200; the
 ‘ costs of the said annuity, and of filing a memorial
 ‘ thereof, to be borne by the said *E. Watts*;—and fur-
 ‘ ther reciting that the said *C. N. A. Humphries*, in pur-
 ‘ suance of the said agreement, had paid the said sum of
 ‘ £5200 to the said *E. Watts*;—it was therefore wit-
 ‘ nessed that, in pursuance and performance of the said
 ‘ agreement, and in consideration of the said sum of
 ‘ £5200, the said *E. Watts* did grant, bargain, sell, and
 ‘ confirm to the said *C. N. A. Humphries*, his executors,
 ‘ &c., for the life of him the said *E. Watts*, one annuity
 ‘ of £800, to be charged and payable as aforesaid;—and
 ‘ it was by the said indenture further witnessed that, for
 ‘ the considerations aforesaid, and for the better and more
 ‘ effectually securing the payment of the said annuity,
 ‘ and also in consideration of 10*s.* to the said *E. Watts*
 ‘ paid by the said Sir *J. T. Wheate*, he, the said *E. Watts*,
 ‘ with the consent of the said *C. N. A. Humphries*, did
 ‘ grant, bargain, sell, demise, and confirm to the said Sir
 ‘ *J. T. Wheate*, his executors, &c., the said rectories and
 ‘ lands, with their appurtenances, for ninety-nine years,
 ‘ upon the trusts, and to and for the uses, intents, and pur-
 ‘ poses, therein expressed and declared:—And also of a
 ‘ warrant of attorney, bearing even date with the said
 ‘ indenture, whereby the said *E. Watts* did authorise
 ‘ certain attornies of the Court of *King’s Bench*, therein
 ‘ named, to confess and enter up judgment in that court,
 ‘ in the penal sum of £10,400, as a collateral security for

‘the payment of the said annuity:—And it was by the said indenture agreed that the said *E. Watts* should be at liberty to repurchase the said annuity, on payment of the said sum of £5200, and all arrears, and giving three months notice in writing:—Which said indenture, as to the execution thereof, is witnessed by *A. B.* of, &c., and *I. G.* of, &c. and a memorial is hereby required to be registered pursuant to the act.—*E. Watts*.—Inrolled, &c.’—The plea then proceeded to state that the said memorial did not contain the names of the witnesses to the said warrant of attorney;—and concluded by alleging that the plaintiff did not hold the said places in which, &c., as tenant thereof, to the said Sir *J. T. Wheate*, otherwise than was in that plea above stated.—The *second* plea in bar alleged that no memorial of the indenture and warrant of attorney, containing the names of all the witnesses to the execution thereof, was inrolled in the High Court of *Chancery*, within twenty days after the execution thereof, according to the act.—The *third* plea stated that no memorial was inrolled.—There were two other pleas, the one stating that the indenture was obtained by fraud and covin;—the last alleging that the plaintiff did not hold as tenant to Sir *J. T. Wheate, modo et formâ*, &c.—To the *first* plea in bar, the defendant demurred generally:—To the *second* and *third* pleas, he replied by setting out the memorial, and then alleging that the said memorial did duly contain the day of the month and the year, when the said indenture and warrant of attorney bore date; the names of all the parties, and for whom any of them were trustees, and of all the witnesses; the annual sum or sums to be paid, the name of the person and persons for whose life or lives the said annuity was granted, and the consideration or considerations for granting the same, in manner and form as by the statute was required.

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—On the *fourth* and *fifth* pleas, the defendant took issue.

—The plaintiff joined in the demurrer to his *first* plea in bar, demurred to the replication made to his *second* and *third* pleas, and joined issue on the *fourth* and *fifth* pleas.

The case came on for argument on a former day in this term.

Mr. Serjt. *Lens*, for the plaintiff, premised that the question which arose on the demurrer to the *first* plea in bar, was the same as that which was raised by the demurrer to the replication to the second and third pleas;—viz. whether there had been a sufficient memorial of the annuity, to sustain the right of the grantee to it (*a*). He made three objections;—*first*, that the memorial did not state the names of the witnesses to the warrant of attorney;—*secondly*, that it did not set forth the trusts of the demise to Sir *J. T. Wheate*;—*thirdly*, that it did not state who were the persons authorized to enter up judgment on the warrant of attorney.—The *first* objection, he said, was clearly fatal under the first section of the act;—the memorial had set out the witnesses to the indenture, but, though he admitted that the witnesses to

(a) By the Annuity Act, 17 Geo. 3. c. 26, s. 1, it is enacted, 'That a memorial of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall, from and after the passing of this act, be granted for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, shall, within twenty days of the execution of such deed, bond, instrument, or other assurance, be inrolled in the High Court of Chancery; and that every such memorial shall contain the day of the month and the year when the deed, bond, instrument, or other assurance, bears date, and the name of all the parties, and for whom any of them are trustees, and of all the witnesses; and shall set forth the annual sum or sums to be paid, and the name of the person or persons for whose life or lives the annuity is granted, and the consideration or considerations for granting the same; otherwise, every such deed, bond, instrument, or other assurance, shall be null and void to all intents and purposes.'

that instrument, and to the warrant of attorney, were the same persons; yet he contended that the grantor had a right to insist that they should be specified in the recital of each instrument, without any reference to the question, whether his security had been diminished, or not, by the omission. It had been expressly decided in the case of *Hopkins v. Waller* (a), that the warrant of attorney was one of those deeds or instruments which the legislature intended should be inserted in the memorial; and in the case of the *Duke of Bolton v. Williams* (b), it was held, that a defect in any one of the deeds set out in the memorial affected the whole transaction, and did not merely vitiate the particular security which was mis-recited;—each being a part of the same assurance. [Lord Chief Justice Gibbs.—While I was practising in the Court of King's Bench, the application to set aside a defective warrant of attorney was confined to that particular instrument, and the court would only set aside the instrument which was so impeached.] On a motion to set aside the warrant of attorney, the question, how far the rest of the transaction was affected by it, would not be raised.—He was aware that it had been contended that the expression in the act, 'otherwise every *such* deed, &c., shall be null and void,' was intended to be confined to the particular instrument that was defective;—such a construction, however, would defeat the main intention of the legislature, which was, that the grantor should have full knowledge of all the instruments by which the annuity was secured; and Lord *Loughborough*, in his judgment on the *Duke of Bolton's* case, gave a very decided opinion against such a construction. The grantee could not, by delivering up one of the deeds, deprive the grantor of the benefit which the act intended

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(a) 4 T. R. 463.—(b) 4 Brown's Chan. Rep. 310.

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to give him.—He then cited *Hart v. Lovelace* (a), where it was held, that a memorial, stating ‘that all the instruments were attested by *A. B., &c. or one of them*,’ was not sufficient, and where Lord *Kenyon* expressed the strong inclination of his opinion to be, that any defect in a memorial of one of the deeds would vitiate the whole. So, in *Van Braam v. Isaacs* (b), though no express decision was given on this point, it might be presumed that the judgment of the court went partly on that ground. The same principle, he said, was recognized in the case *ex parte Mackreth* (c).—The second objection appeared on the face of the memorial itself; for at the conclusion of the recital of the indenture, it was stated that the lands were demised to Sir *J. T. Wheate*, ‘upon the trusts, and to and for the uses, intents, and purposes, therein expressed and declared.’ This, he contended, did not, in any sense, comply with the enactment, that it must appear for whom the parties were trustees; and though it had been questioned how far it was necessary to state the trusts, no such doubt could avail the defendant in the present case, because it was impossible to discover for whom Sir *J. T. Wheate* was a trustee. A trustee might often have a double duty to perform; partly towards the grantee, and partly towards the grantor; for, though nominated as a trustee for the former, he might, for some purposes, have been a trustee for the latter also. In the case of *Askew v. Mackreth* (d), where the trustee was described merely ‘as a trustee nominated on the part of the grantee,’ without stating any of the trusts, that was held to be an insufficient description. In *Dolman v. Dolman* (e), the memorial was held to be defective, in stating that part of the considera-

(a) 6 *T. R.* 471.—(b) 1 *B. & P.* 451.—(c) 2 *East.* 563.
 —(d) 1 *N. R.* 214.—(e) 5 *T. R.* 641.

tion was paid 'in trust, and for the purposes in the deed mentioned.'—He next cited *Cummins v. Isaac* (a), where the court set aside an annuity, because one of the trusts was omitted in the memorial;—and *Taylor v. Johnson* (b), where the court held the memorial defective, in not stating a *previous* trust, viz. 'to permit T. S. to receive the rents 'and profits, until default made in payment of the annuity to the grantee:'.—In the latter case, though the trustee had nothing more than he would have had without that special provision, yet the court considered that it was part of the trust, and should have been stated more fully. The most recent case on the subject, he said, was that of *Leycester v. Lookwood* (c), where a memorial, which, like the present, stated that the interest of £10,000 (being the security for the annuity) was by the deed conveyed to the grantees *upon the trusts thereby declared*, was held to be defective. With respect to the *third* question, whether the persons who were authorized to enter up judgment, ought not to have been named in the memorial, he contended that, though the warrant of attorney was only a formal instrument, yet it was part of the assurance; and that the persons who were named in it became thereby parties to the instrument, and ought to be set out in the memorial, in order that the grantor might, if necessary, be able to resort to them.

Mr. Serjt. *Best*, *contrà*.—With respect to the *first* objection, he contended, in the first place, that the warrant of attorney itself was not vitiated by this omission. None of the cases which had been cited by the other side were exactly in point, nor had it ever been expressly decided that, where it appeared on the record that the witnesses to both instruments were the same, it was necessary to set them out in each; the grantor could derive from the

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(a) 8 T. R. 183.——(b) *Ibid.* 194.——(c) 1 M. & S. 527.

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record, as it stood, all the information on the subject that he could want, or to which he was entitled. All that the act required was, that the memorial should contain the names of all the witnesses; the present memorial did contain the names of all the witnesses, and the objection was that that, which would have been an unnecessary repetition and a mere idle form, had not been done.—In the case of *Van Braam v. Isaacs*, it appeared that no notice had been taken either of the witnesses to the indenture, or of those to the warrant of attorney;—and in *Hart v. Lovelace*, the names of the witnesses were imperfectly set out, and the objection applied equally to both instruments;—those cases, therefore, were materially distinguishable from the present. The case of *Watts v. Milford* (a) he considered to be strong in favour of his argument. There, one of the objections to the memorial was, that the christian name of one of the witnesses to the warrant of attorney was not set forth, and though the case was decided on another ground, the court said there was no weight in that objection. When there was no case exactly in point upon the subject, the court, he said, would decide by analogy to others:—Now the act required that the consideration for granting the annuity should be set forth in the memorial; and in *Hodges v. Money* (b), it was objected that the consideration of the bond or warrant of attorney was not stated, but only that of the indenture; in answer to which objection, Lord Kenyon said that, as the act only required the memorial to contain the consideration of granting the annuity, it would be absurd to repeat the same thing several times in the same memorial. So, by parity of reasoning, it was equally unnecessary to repeat the names of the witnesses in all the deeds. [Lord Chief Justice Gibbs.—That case is not ap-

(a) 5 T. R. 598, — (b) 4 T. R. 500.

applicable to the present ; for the first section of the act only says that the consideration must appear on the memorial ; therefore, when it has once been stated, that clause is complied with. The third clause goes on to enact, that the consideration must appear in all the deeds by which annuities shall be granted.] Supposing, however, that this objection was to be considered as fatal to the warrant of attorney, still, he contended, the other deeds remained untouched by it. It was quite sufficient to make parties cautious, that the instrument itself, which was incorrectly stated, should be set aside, without vitiating all the other instruments ; and in the case *Ex parte Chester* (a), the court were of opinion that the word ‘*such*’ in the act confined the operation of the first section to the particular deed which was not truly recited in the memorial. But looking at the words of the act, it was impossible, he said, to contend that the expression ‘*or other assurance*’ meant to include the whole transaction ;—it was only intended to embrace any instrument which might not be particularly specified. The word ‘*assurance*’ might certainly sometimes mean all the instruments by which property was to be conveyed ; but it would be doing violence to grammar and to common sense, to put such a construction upon it in the present instance.—*Secondly* (b), he contended that the trusts were sufficiently set out. There were no particular trusts set out in the deed ; and the memorial stated that, ‘*for the better and more effectually securing the payment of the said annuity, and in consideration of 10s. paid to the said E. Watts by the trustee, the said E. Watts did grant the estates, &c. to the trustee, upon*

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(a) 4 T. R. 694, Lord Kenyon being absent.

(b) Mr. Serjt. Best not being aware that this objection had been raised, his argument on that point, and Mr. Serjt. Lens's reply, took place on a subsequent day, Saturday the 22d of April.

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'the trusts, &c. therein expressed and declared.' It was plain, therefore, on the face of the memorial, for whom Sir J. T. Wheate was a trustee, viz. for the annuitant. It was sufficient, he contended, that it appeared plainly for whom he was a trustee, without expressly stating it. If the plea had averred that there were other trusts which were not memorialized, the objection might have been good; but it was not pretended that there were any other trusts, and that circumstance, he said, distinguished the present case from all the others on the subject. In the case of *Leycester v. Lockwood*, on which the other side had mainly relied for the support of this objection, there were several different trusts, and there were no words in the memorial, from which it could be inferred for which party the defendant was trustee. The *King's Bench*, however, even there hesitated before they allowed the objection, and when at length they did allow it, the terms of their judgment (a) shewed that they yielded with difficulty, and that at all events, they would have given no weight to the present objection. The same observation applied to the cases which were cited in *Leycester v. Lockwood*, and to those which had been cited by the plaintiff. In *Bradford v. Burland* (b), it did not distinctly appear upon what ground the judgment was founded; but in the course of the argument the court intimated an opinion, that as there was a trust for the grantor, that should have been set out. So in *Dolman v. Dolman*, Lord Kenyon, who went further on the subject than the other judges were inclined to go, proceeded on the same ground, viz. that there were several trusts, and only one of them set out. In *Askew v. Mackreth*, *Contt* was stated in the memorial to have been nominated as

(a) p. 534.—(b) 14 East. 445.

trustee for the grantee of the annuity generally; whereas there was another and very beneficial trust for the grantor, till the happening of a particular event:—viz. until default was made in the payment of the annuity: In *Cummins v. Isaac*, and *Taylor v. Johnson*, the same answer applied still more forcibly. In all these cases, there were several trusts in the deeds, which were referred to in the memorial generally; *here*, there was but one in the deed, and it therefore appeared sufficiently clear by the general reference. He then cited *Defaria v. Sturt* (a), as exactly in point and in his favour; there, the memorial stated the demise to be ‘in trust for the better securing the payment of the annuity, with such powers, and in such manner, as were particularly mentioned, expressed, and declared concerning the same,’ so that there was scarcely a letter of difference between the two cases. The late Lord Chief Justice *Mansfield* said on that occasion, that, leaving all the cases and arguments about this unfortunate act out of the case, no man in his senses could hesitate to say that the trust, as far as appeared on the memorial, was for the annuitant: so, in the present case, no one could doubt but that Sir *J. T. Wheate* was trustee for the annuitant. The judgment in *Defaria v. Sturt* corresponded with that which was delivered in the court of *Exchequer* in that case (b), where Lord Chief Baron *Macdonald* established the distinction between the cases where there is but one trust, and where there are several.—If, however, Sir *J. T. Wheate* had been trustee for any one else, it ought to have been so stated on the plea;—the court would not travel out of the pleadings, nor presume that a trust existed which was not stated. As this was an objection which did not go to the merits of the case, the court would be inclined rather to lean against it than in favour

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(a) 2 Taun. 225.——(b) *Ibid.* 234, note.

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of it.—With regard to the *third* objection, he said that there was no case where the names of the attornies were required to be inserted. The act, which, he said, had certainly been carried full as far as the legislature had intended, only required that the names of the *parties*, that is the *principals*, should be inserted; it did not extend to mere attornies or agents. The attorney could no more be considered as a party to this transaction, than he could to a cause which he was conducting; and if every one who had any thing to do with the annuity were to be considered as a party, there would have been no occasion to have specified witnesses, as necessary to be inserted in the memorial.

Mr. Serjt. *Lens*, in reply.—As to the *first* question, he said that the plaintiff had confounded the distinction between what was contained in the memorial itself, and what appeared *debors* the memorial. It was not the less necessary to set forth who were the witnesses to the warrant of attorney, because it appeared from other matter who those persons were. In *Van Braam v. Isaacs*, the witnesses to the indenture were the same as those to the bond and warrant of attorney; and yet it was held insufficient to state them as witnesses to the former instrument. As to *Hart v. Lovelace*, though that case was not exactly in point, still, he contended, it was the same in substance. The case of *Watts v. Millard*, which had been cited by the plaintiff, was no authority in the present instance.—[Lord Chief Justice *Gibbs*.—To be sure that was quite a different question, viz. whether a witness who was named had been described with sufficient accuracy.]—It had been urged, that, even admitting that this was an objection to the warrant of attorney, that instrument alone would be affected by it. He contended, however, that a party could not be allowed to strike off that part of the security which was bad, and leave the rest untouched.

The question was, not whether a party should give up the inefficient instrument, but whether the whole transaction were not void ;—not whether the instrument should remain in his hands, but whether it should be carried into effect, by enforcing the remaining part of the assurance. It never could have been the intention of the act, to make these separate and distinct instruments; on the contrary, the word assurance had been introduced, in order to meet every instrument by which the assurance might be effected ; and the expression ‘every *such* deed, &c.,’ must be taken to mean every deed, which was calculated for securing such annuity. The case *Ex parte Chester* was determined in the absence of Lord *Kenny*, and was therefore not inconsistent with his lordship’s opinion in *Hart v. Lovelace*. The Duke of *Bolton*’s case, he said, was the leading case on this subject, and had never been overruled. With respect to the statement of the trusts, he insisted that it was necessary, either to say explicitly for whom the trustee took the estate, or else to set out all the trusts ; and if there were any doubt as to the former question, the better way was to adopt the latter course ; the defendant had done so, but he had set them out imperfectly.—It would be by no means inconsistent with this memorial, if Sir *J. T. Wheate* had been trustee for the grantor in the first instance, and for the grantee afterwards.—*Lastly*, as to stating the attornies who were to enter up judgment, he admitted that they were not parties to the granting the annuity ; but if the word ‘parties’ were to be confined to so strict a sense, the grantor and the grantee would be the only persons necessary to be inserted. That, however, would not satisfy the object of the act, which was to extend the provision to parties who came in collaterally and incidentally ; and it was material to see who were the attornies appointed to enter up judgment, though they should not, in fact, be

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the persons who performed that office.—There was no necessity for any such rule, as to the principals in the transaction.

*Cur. Adv. Vult.*

On this day, Lord Chief Justice GIBBS delivered the judgment of the court.—His lordship, after stating the pleadings, and the three objections on which the memorial was impeached, proceeded thus:—I shall first consider the second objection, which is, that the trusts of the demise are not sufficiently set forth;—because that immediately affects the indenture.—Let us see how that is stated:—‘For the better and more effectually securing  
 ‘the payment of the said annuity, and in consideration  
 ‘of 10s., the said *E. Watts* did grant the said estates  
 ‘upon the trusts, and to and for the uses, intents, and purposes, therein expressed and declared:’—And the objection is, that it does not appear on the memorial for whom Sir *J. T. Wheate* was trustee; nor what the trusts were, to which his estate was subject. It happens that there is a case of *Defaria v. Sturt*, which was decided in this court, and which, though there may be some literal distinctions, I think it is impossible to distinguish materially from the present. In that case, the memorial stated, that ‘the demise was in trust for the better securing the payment of the annuity, with such powers, and  
 ‘in such manner, as were particularly mentioned, expressed, and declared, concerning the same.’—It was objected there, that those powers, and the manner in which they were granted, did not sufficiently appear; but the court asked a question, which may with equal reason be put here; viz. what reasonable man could doubt for whom the trustee held the estate, when it is stated that the lands were granted for the powers, &c., therein mentioned. Now where is the difference between the two cases? It is

urged on the part of the plaintiff, that there may be other trusts, besides those that are stated in the memorial; but if there be, it is incumbent on those who wish to impeach the memorial, to shew what they are;—and that is the distinction between the present case, and that of *Leycester v. Lockwood*; for there, it appeared to the court that there were certain trusts created by the deed, which ought to have been inserted, and on that circumstance, the judgment of the court was founded. The present case, however, is not to be distinguished from that of *Defaria v. Sturt*;—the *second* objection, therefore, is disposed of.—Two objections still remain; one of which is, that the memorial does not state the names of the attornies who are authorized to enter up judgment. As to that, the statute certainly does not require that they should be named; for I think it is impossible, by any construction, to suppose that the legislature meant to comprehend the attornies who enter up judgment, under the description of *parties*;—that objection, therefore, cannot prevail.—The only remaining objection is, that the names of the witnesses to the warrant of attorney are not stated; and, certainly, *as such*, they do not appear on the memorial; but it appears that the witnesses to the warrant of attorney are also the witnesses to the indenture, and the memorial does set them out in the latter character. The statute only says that the memorial shall contain the names of all the witnesses; that provision, therefore, has been literally complied with; for the memorial does contain the names of all the witnesses. If any fraud could possibly arise from the omission, we should say that the memorial ought not to be supported, but the object of the legislature was only, that the party who disputed the validity of the annuity should be referred to all the persons concerned in it; all the witnesses, therefore, having been named, no fraud could be

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practised by this omission, and we cannot say that the annuity is void in consequence of it.—The case of *Orton v. Knight* (a) goes some way in support of our opinion;—in that case, there were three parties to the indenture, *A.*, *B.*, and *C.*; and the memorial stated that it was executed by *A.* and *C.*, omitting the name of *B.*, in the presence of *R. B.* and *G. H.*;—the court held that, as the names of all the persons who attested the instrument were specified, the object of the act had been complied with, though it did not appear in whose presence *B.* executed it. There is a note of the reporters of that case, which suggests, ‘that when the same witnesses attest several instruments, it is not sufficient to mention their names as witnesses to one only;’—and in *Van Braam v. Isaacs*, to which that note refers, that objection was taken; but, looking at the judgment of the latter case, it does not appear that the opinion of the court was founded on that objection in particular; for the two objections were taken together. We are of opinion, however, that, even if this were a fatal objection, it would only affect this particular instrument; for, though the doctrine laid down in the *Duke of Bolton’s* case, and in *Hart v. Lovelock*, was, that if one deed be affected, all the rest are vitiated; yet, looking at the words of the act, we cannot think that such was the intention of the legislature, but rather that each deed should stand on its own ground. The different deeds might be entered into at different times, and there might be different memorials of the different securities; and we think that that security only, the memorial of which is bad, would be bad also.—On all three grounds, therefore, we think there should be

Judgment for the defendant. (b)

(a) 3 B. & P. 153.—(b) *Vid. supra* the case of *Jackson v. Milsentown*, in this term.

LUNN v. PAYNE.

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Tuesday,
April 25.

THE plaintiff declared on a bond, dated the 23rd of January, 1812, in the penalty of £900. The declaration set out the condition of the bond;—by which, after reciting, among other things, that it had been agreed between the defendant and *Elizabeth*, his wife, to live separate, and that the defendant had agreed to pay to the said *Elizabeth* the sum of £20 *per annum* during his life, by four equal and quarterly payments, for her separate support and maintenance,—it was declared, among other things, that, if the defendant should and did permit the said *Elizabeth* to live separate from him, and should pay and allow to the said *Elizabeth* the said sum of £20 yearly, by four equal quarterly payments, towards her separate support and maintenance, then the said obligation to be void.—Yet, that during the life of the said *Elizabeth*, viz. on the 1st of October, 1814, the sum of £30 of the said yearly sum of £20, for six quarters of a year, then elapsed, became due and owing from the defendant to the plaintiff, and still is in arrear, &c., whereby an action hath accrued, &c.—Yet the defendant hath not yet paid the said sum of £500 to the plaintiff, but hath hitherto neglected and refused, &c.—The defendant pleaded *non est factum*, and at the trial of the cause at *Westminster*, at the sittings in last *Hilary* term, the jury found a verdict for the plaintiff for the arrear of the annuity.

Mr. Serjt. *Vaughan* moved, in the same term, in arrest of judgment, on the ground that the breach was not well assigned, in stating the arrears to be due and owing from the defendant to the plaintiff, instead of to the defendant's wife, according to the terms of the condition.—A rule *nisi* was accordingly granted, and

Mr. Serjt. *Lens* now shewed cause. He contended

In an action on a bond, conditioned for the payment of a separate maintenance to the obligor's wife, the declaration alleged that certain sums became due and owing from the defendant to the plaintiff;—judgment arrested, because the breach should have alleged the money to be due to the wife.

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the defendants to a bill of discovery,—filed against them in the Court of *Chancery*, for the purpose of procuring evidence in an action which had been brought against them on the former part of the 2nd section, to recover the money actually lost (*a*), and without which bill there was no evidence to affect the defendant *D'Arley*,—could not be read in evidence against them in this action, which was an action for the penalties.—The Chief Justice directed a verdict for the plaintiff, for the amount of the money lost, and treble the value, subject to the opinion of the court on the points above stated.

Mr. Serjt. *Best*, accordingly, on a former day in this term, moved to set aside the verdict, and enter a nonsuit.—With respect to the *first* point, he relied on *Harris v. Woolford* (*b*), where it was held not to be sufficient to shew that a writ was sued out in time, without also proving that it was returned; [Lord C. J. *Gibbs*.—In that case there were two writs, and the court will presume, where there are two writs, that the plaintiff proceeded on the latter, unless he can connect the two together; the second being the *institution* of the cause.]—and *Weston v. Fournier* (*c*), where, two writs having been sued out, the court held that, if the second were out of time, the plaintiff must shew a return and continuance of the former.—As to the *second* objection, the Chief Justice said there was nothing in it; observing that the offender might, after the bill filed, redeem himself from the penalties imposed by the latter part of the section, by paying back the money actually won.—A rule *nisi* was, however, granted on both grounds, and

Mr. Serjt. *Copley* now shewed cause.—As to the *first* point, he contended that, where a writ was sued out and

(*a*) That case is reported in 1 *M. and S.* 500.—(*b*) 6 *T. R.* 617.—(*c*) 14 *East*, 491.

not returned, and the declaration was filed within a year after suing out the writ, that was sufficient, without shewing that the writ had been returned or served. In the present case, therefore, the only question was, whether there were sufficient *prima facie* evidence of the declaration being in time:—Now the rule was, that if the plaintiff did not declare in time, the cause was out of court; if, therefore, the cause were not out of court,—and here the defendant, by pleading to it, had admitted that it was not,—that was *prima facie* evidence that the declaration was in time. In the cases which had been cited by the defendants, there were two writs, and the court presumed that the declaration was filed on the second:—Here, on the contrary, there was only one writ which appeared to the court; and as that was sued out in time, the court would presume that the declaration was connected with it, and therefore, regular, there having been no evidence offered to repel such presumption. He then cited *Hutchinson v. Piper* (a), where this court held that, in a *qui tam* action, the production of the writ within the time limited was sufficient, without connecting the declaration with it by any other evidence.

Mr. Serjt. *Best*, *contra*, was stopped by the court.

Lord Chief Justice GIBBS.—We all think that it lay on the plaintiff to go further in this case. It is admitted, on both sides, what the rule is; and the only question is, as to the evidence necessary to bring the case within the rule. It is admitted that the simple production of the writ, though sued out in time after the commission of the offence, would not be sufficient, without connecting it with the proceedings on the record by evidence:—If the declaration be filed within the time allowed by the rules

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(a) 4 Taun. 555.

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of the court, they are sufficiently connected; if not, other evidence is necessary to connect them. The two courts differ with respect to the evidence necessary;—in the court of *King's Bench*, the *placitum* contains a memorandum of the same term, as that in which the bill is filed; it appears, therefore, on the face of the record, whether the bill were filed within a year after the writ was sued out, and if it were not, it would be necessary to shew that the writ had been returned, and that there had been the proper continuances:—In this court, however, the record does not prove the time of filing the declaration, for the *placitum* is always of the term in which the issue is joined. Here, therefore, it lay on the plaintiff to shew that the declaration was filed within the time prescribed.—*Per Curiam*,

Rule absolute.

Saturday,
 April 29.

SCHMALING v. TOMLINSON and others.

A., on the recommendation of his agent, employs *B.* to convey goods from this country to the continent. *B.*, without the knowledge of *A.*, employs *C.* to transact the business, and the goods are accordingly shipped by *C.*, and landed on the continent by *C.*'s agents.—*Held*, that there was no privity between *A.* and *C.*, and therefore that *C.* was not entitled to recover his charges, or those of his agents, from *A.*, though *A.* had not paid the amount to *B.*

THIS action was brought to recover the sum of £3600, being the amount of duties, freight, premiums of insurance, warehouse rent, and other charges, incurred by the plaintiff in introducing a quantity of cocoa, the property of the defendants, into *Holland* for sale, under the following circumstances.—The defendants, in the year 1809, consigned the cocoa in question, from *Buenos Ayres* to their agents Messrs. *Hullett* and Co. in *London*; that

—*Held*, that there was no privity between *A.* and *C.*, and therefore that *C.* was not entitled to recover his charges, or those of his agents, from *A.*, though *A.* had not paid the amount to *B.*

species of goods being then at a very low price, Messrs. *Hullett* and Co. wrote to the defendants, stating that they had received information from Messrs. *Aldebert* and Co. that the latter had an opportunity of sending a parcel of cocoa to the continent, provided they could receive it immediately, and that they had reason to think it would come to a good market; adding, that if the defendants were disposed to venture the goods, they would be pleased to answer accordingly, and that Messrs. *Aldebert* and Co. were a very respectable house, and, they conceived, perfectly safe. The defendants answered Messrs. *Hullett* and Co., by saying, that if they, Messrs. *Hullett* and Co., thought it a prudent measure that the cocoa should be sent to the continent at that juncture, through the medium of Messrs. *Aldebert* and Co., they, the defendants, should readily concur in the measure; observing that Messrs. *Aldebert* and Co. were quite strangers to them, but that they doubted not their respectability, in consequence of what Messrs. *Hullett* and Co. had said respecting them; and that they were willing to let them be shipped in the manner proposed.—On the 16th of *November* following, Messrs. *Hullett* and Co. wrote to the defendants, stating that the cocoa was shipped by Messrs. *Aldebert* and Co. for *Holland*, and that an insurance had been effected on them, on account of the defendants.—The fact, however, was that *Aldebert* and Co., having no correspondents in *Holland*, and the existence of the continental system rendering some management necessary in the introduction of the goods, employed the plaintiff, who was connected with a house there, to undertake the management of the transaction; and the cocoa was accordingly shipped to *Holland* by the plaintiff, and landed at *Embsen* by his immediate agents; and was afterwards forwarded by the same means to *Vienna*, where they remained unsold at the time of

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bringing this action. The defendants had not paid *Ald-
bert* and Co. for the expenses incurred by the plaintiff. The cause was tried before Lord C. J. *Gibbs*, at *Guildhall*, at the sittings after last *Hilary* term, when his lordship stated his opinion to be, that there was no privity between the plaintiff and the defendants, and that therefore the action could not be sustained. His lordship mentioned a case of *Cull v. Backhouse*, at the sittings after *Hilary* 1793, *coram* Lord *Kenyon*. "That was an action for work and labour, and money paid;—the defendants had employed *A. B.*, in *America*, to purchase corn for them and ship it to *England*;—*A. B.* employed the plaintiff to convey the corn from the inland part of the country to the coast, and to pay certain dues payable upon it;—the corn was shipped and received by the defendants;—*A. B.* became insolvent, without having discharged the plaintiff's demand;—and the defendants had not paid or made any allowance to *A. B.* on that account, when they had notice of the plaintiff's demand:—The action was brought to recover the amount of that demand, and was resisted on the ground that the defendants, having employed *A. B.* only, were answerable to him alone, and had nothing to do with the plaintiff, or any other person whom *A. B.* might have employed under him;—the plaintiff, on the other hand, insisted that as the defendants had had notice of his demand, before any payment made, he might well support this action. Lord *Kenyon*, however, held that *A. B.* being the only person with whom the defendants had contracted, he alone could sue them at law."—In the present case, a verdict was found for the plaintiff, on the ground that the goods were actually shipped by him; but subject to the opinion of the court, whether the plaintiff were entitled to recover;—the jury having found that there was no actual privity between him and the defendants.

Mr. Serjt. *Best*, having, on a former day in this term, obtained a rule *nisi* to set aside this verdict and enter a nonsuit,

The *Solicitor General* and Mr. Serjt. *Lens* now shewed cause against it. The only part that *Aldebert* and Co. had taken in the transaction, was to point out to the defendants a person who, from his connections on the Continent, was able to carry it into effect; and when that person was so appointed, he became the immediate constituted agent of the defendants themselves. The plaintiff, therefore, was not to be considered as the subordinate agent of *Aldebert* and Co., as in the case of *Cull v. Backhouse*; for there *A. B.* was the person employed to carry the whole transaction into effect, and the plaintiff was only employed to perform a part of it, as the mere sub-agent of *A. B.* So where a person was employed to manufacture any thing for another, as in the case of a coach-maker, who employs the smith, the wheelwright, &c., to make the component parts of the whole, it could not be contended that there was any privity between such subordinate agents and the original employer;—here, on the contrary, the plaintiff was the principal agent who was to transact the whole business, and who alone was responsible for the due performance of it; and the persons employed by him on the continent would properly enough be considered in the same light as the plaintiff in *Cull v. Backhouse*. *Aldebert* and Co. would perhaps be liable to the plaintiff, if the latter were not paid by the defendants; but that did not decide the present question; and it was not pretended that any payment had been made by the defendants to *Aldebert* and Co. They concluded, therefore, by insisting that, though there was no *direct* or *immediate* privity or communication between the plaintiff and defendants, yet that there was that *substantial* privity between them, which entitled the plaintiff to

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recover.—The defendants were the persons really and beneficially interested in the transaction, and the plaintiff was the person really and substantially employed to carry it into effect.

Adjournatur.

On this day the Chief Justice said, that the court had considered the case, and were of opinion, that it was impossible for the plaintiff to support this action ; and that therefore it was not necessary to hear Mr. Serjt. *Best*, who was to have argued in support of the rule.—His lordship then continued thus :—The truth is, that there was no privity between the plaintiff and the defendants. The plaintiff never presented himself to the notice of the defendants, except by bringing this action ; and besides, there was nothing in the transaction, from which they could conjecture that the plaintiff was the person who was to conduct the business, nor was there any thing to justify *Aldebert* and Co. in employing the plaintiff. It is true, the defendants must have known that *Aldebert* and Co. employed their sub-agents, and had persons at the different places to which the goods were sent, for the purpose of receiving them ;—but there was nobody, in the eye of the defendants, who could stand in the place of *Aldebert* and Co. The fact was, that the defendants employed *Aldebert* and Co., because that house was recommended to them by their own agents, and they confided in them alone ; the action, therefore, cannot be supported against them by the plaintiff, who was not confided in by them, and who was employed by *Aldebert* and Co. only.—*Per Curiam*,

Rule absolute to enter a nonsuit.

WEAVER v. SESSIONS.

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Monday, May 1.

THIS was an action of covenant, and the plaintiff declared, that by an indenture, made between the plaintiff of the one part, and the defendant of the other part, the plaintiff, for the considerations therein mentioned, demised to the defendant a public-house and premises, for a term of years still unexpired, at a certain rent therein mentioned:—And the defendant covenanted, that he should and would, from time to time, and at all times during the continuance of that demise, buy and purchase of the plaintiff all the malt which he should brew into ale or beer, or otherwise use and consume in the said messuage:—And the plaintiff covenanted that he should and would, upon every reasonable request of the defendant, deliver to him a sufficient quantity of good, well-dried, marketable malt, for the use of the defendant in the said messuage, at a market price; but that if the plaintiff should neglect or refuse so to do, the defendant should and might purchase the same of any other person:—And the plaintiff averred that the defendant did not nor would purchase and buy of him all the malt which he brewed into ale and beer, and otherwise used and consumed in the said messuage, but wholly refused and neglected so to do; and although the plaintiff, at the several times hereinafter mentioned, was ready and willing, upon every reasonable request of the defendant, to deliver a sufficient quantity of good, well-dried, marketable malt, for the use of the defendant in the said messuage, of which the defendant had notice:—Yet the defendant, heretofore, viz. on the 1st of *October*, 1813, and on divers other days, &c., brewed into ale and beer, and otherwise used and con-

The plaintiff demises a public house to the defendant;—the defendant to take all his malt of the plaintiff; the plaintiff, upon every reasonable request, to deliver good malt, and if he did not, the defendant to be at liberty to buy it of any other;—*breach*, that the defendant used a quantity of malt, not bought of the plaintiff, and without requiring the plaintiff to deliver such.—*Plea*, that the plaintiff had delivered bad malt to the defendant, who thereupon bought malt of others.—*Held*, that the plea was bad;—for as one failure by the plaintiff would not operate as a total suspension of the covenant, the defendant should have alleged a request to send him good malt; and that he had purchased the malt of others, on the plaintiff's failure to do so.

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sumed in the said messuage, divers large quantities of malt, not bought or purchased of the plaintiff, and without requiring the plaintiff to deliver such malt to the defendant. To this declaration, the defendant, together with other pleas, pleaded that though true it was, that the defendant did not nor would purchase and buy of the plaintiff all the malt which he brewed into ale and beer, and otherwise used and consumed in the said messuage; yet that the plaintiff, for a long time after the making of the said indenture, did neglect and refuse to deliver to the defendant a sufficient quantity of good, well-dried, marketable malt, but on the contrary, delivered to the defendant divers large quantities of bad, ill-dried, unmarketable malt, to be brewed into ale and beer, &c.; by reason whereof the said ale and beer became and was so bad and unsaleable, that the defendant was in great danger of losing the custom of many persons who used to resort to his house. And thereupon, the defendant, in order that he might brew a sufficient quantity of good, strong, and saleable ale, for the supply of his customers, did on the said day and year, and on divers other days, as is in the said declaration mentioned, buy and purchase divers large quantities of malt of other persons, and did use and consume the same in the said dwelling-house.—To this plea the plaintiff demurred, assigning for causes, that it was not stated or alleged by the said plea, that at the several times, in the assignment of the said breach of covenant mentioned, the plaintiff had either neglected or refused, or was unwilling or unable to deliver to the defendant, upon his reasonable request, a sufficient quantity of good, well-dried, marketable malt, for the use of the defendant in the said messuage, at a market price;—or that the defendant had, at those times, or either of them, requested a delivery of such malt. The

defendant joined in demurrer, and on this day the case came on for argument.

Mr. Serjt. *Lens*, in support of the demurrer, observed that the question was, whether the defendant were discharged in all instances, and on all occasions, from observing the covenant into which he had entered, merely because on one occasion he had been supplied with goods, which did not correspond in quality with those which the plaintiff had agreed to supply him with. The plaintiff would have to contend, that there having been one failure on the part of the plaintiff, the defendant was altogether discharged; without giving the plaintiff an opportunity of taking back and changing the goods complained of; for the plea did not state that the defendant had only supplied the deficiency in that particular instance;—this however, he contended, was contrary to the plain meaning of the contract. He was here stopped by the court, who called upon the defendant's counsel to support his plea.

Mr. Serjt. *Copley*, accordingly, contended that if the whole of this plea were taken together, the allegations contained in it would be found to be sufficient; and the plaintiff, therefore, instead of demurring, should have replied that the defendant had purchased more malt than was sufficient to supply the deficiency. The objection was, that there had been no request made to the plaintiff to supply the defendant with good malt, at the time when the latter purchased it of other persons; it was to be presumed, however, that the bad malt was delivered on request, and he contended that that request was sufficient, and that it was not incumbent on the defendant to give notice to the plaintiff, that he had delivered goods of a bad quality; the responsibility lay on the plaintiff to send good malt, and it was after his neglect to furnish

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such, that the defendant had purchased it of other persons. He cited *Holcombe v. Hewson* (a), and *Cooper v. Twibill* (b), as going the whole length of shewing that the defendant was discharged altogether from his covenant, by a failure on the part of the plaintiff to supply him with good malt ;—but perhaps, he said, the principle might be qualified, by supposing that on the plaintiff's default, the covenant was suspended, and that the defendant had a right to purchase his malt elsewhere, until the plaintiff had determined such suspension of the covenant, by tendering goods of a proper quality. If, however, he could not be allowed to go that length, still he contended that the plea, as it stood, was sufficient, and that the plaintiff should therefore have replied to it.

Lord Chief Justice GIBBS.—The defendant has placed himself in a situation of great disadvantage, but he has placed himself in it by his own act ; he has entered into this covenant, because his landlord probably would not have received him on any other terms, and he has guarded himself in the way which appeared best to him ; and we can only look to the covenants, into which the parties have chosen to enter, as they stand. Now in what way has he secured himself ?—He has *first* his action of covenant against the plaintiff, if the latter should deliver him bad malt ;—and *secondly*, he is at liberty to resort elsewhere, on certain occasions ; but only to satisfy the orders which may have been ill supplied by the plaintiff. The plaintiff complains that the defendant has consumed one thousand bushels of malt, not bought of the plaintiff, and without requiring the plaintiff to deliver such malt to him ;—to this, the defendant has pleaded, that the

(a) 2 Camp. 391. — (b) 3 Camp. 286. (s).

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plaintiff neglected for a long time to deliver to him a sufficient quantity of good malt,—without stating any particular request. Now it appears to me, that these general allegations do not sufficiently connect the malt, purchased by the defendant, with the orders improperly complied with, so as to excuse the defendant for buying of other persons. He should have stated that he required the plaintiff to send him malt, that the plaintiff did so, but that it turned out bad, and that to supply the deficiency, he had purchased the malt in question ; otherwise, if we give this a larger construction, we shall decide that one failure, on the part of the plaintiff, would let in the defendant to break the covenant altogether. And I cannot agree, that the effect of such failure would not be confined to that particular instance, or that it would suspend the covenant, until the defendant received an intimation from the plaintiff, that he would supply him better. I see no ground for such a construction, nor any reason for giving the covenant so wide an effect ;—and I am therefore of opinion, that the plea cannot be supported.

Mr. Justice HEATH.—I am of the same opinion. This was a very improvident covenant, but as the defendant has thought proper to enter into it, he must abide by it.

Mr. Justice CHAMBER.—Even as the covenant is framed, I cannot see how there can be any failure of justice in this case. If the malt were bad, the defendant might apply elsewhere ; but he must entitle himself so to do, by averring that he had requested the plaintiff to send him malt on the particular occasions, when he was obliged to procure it elsewhere. There is nothing to be found in this plea, which entirely discharges the defendant from his covenant.

Mr. Justice DALLAS.—The only question in this case is, what covenant the parties have entered into. No

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doubt but they might have covenanted, that on a single failure, the covenant should be at an end; that, however, they have not done, and the only question that remains, therefore, is, whether a single instance of failure, on the part of the plaintiff, would put an end to the covenant as it stands; I think it would not, but that the defendant's remedy was on the particular breach.

Judgment for the plaintiff.

Tuesday,  
 May 2.

POSTLE V. BECKINGTON.

Where the defendant pays money into court, and the plaintiff proceeds, and suffers the defendant to sign judgment of *nonpros* against him, he shall not afterwards be entitled to his costs, up to the time of paying the money into court.

THE *Solicitor-General* moved, on the part of the defendant in this action, that the prothonotary might review his taxation of costs. The case came before the court on facts, which were agreed upon by both parties, and which were as follows.—This was an action for goods sold and delivered; the defendant paid £18 into court, the cause went on, and was set down for trial at the sittings after last *Michaelmas* term, but the plaintiff withdrew his record; in *Hilary* term, the defendant ruled the plaintiff to enter his issue, in default of which he signed judgment of *nonpros*;—after this judgment was signed, the plaintiff taxed his costs up to the time when the money was paid into court, and contended that he was entitled to set them off against the defendant's costs of the judgment;—the prothonotary allowed the costs, and taxed them at £10 9s. 10d., subject to the opinion of the court, whether, if the plaintiff neglected to take out the money which had been paid into court, and suffered the defendant to sign judgment of *nonpros*, he were entitled to the

costs incurred before the money had been paid in.—The *Solicitor-General* cited *Crosby v. Olorenshaw* (a), where the court of *King's Bench* held that, where the defendant had paid money into court, and had afterwards obtained judgment as in case of a nonsuit, the plaintiff could not afterwards claim his costs up to the time of paying the money into court;—and Lord *Ellenborough* said he was inclined to think ‘that a judgment as in case of nonsuit was the same in all its consequences, as if the plaintiff had proceeded to trial, and the defendant had obtained judgment upon nonsuit or verdict.’—If there were to be any distinction between judgment of *nonpross*, and judgment of nonsuit, the plaintiff, by refusing to enter his issue, and suffering the defendant to enter up judgment of *nonpross*, would retain all the advantages which he would have had, if he had taken the money out of court, and taxed his costs, in the first instance. The principle, he said, was the same in all cases;—that if the plaintiff, instead of taking the money out of court, and taxing his costs up to the time when it was paid in, suffered the cause to proceed and be determined in any way, the case was the same as if he had gone to trial.

Mr. Serjt. *Bosanquet* shewed cause in the first instance, and said that the general rule, established by a variety of cases, was, that unless the plaintiff actually proceeded to trial, he was entitled to his costs up to the time of paying in the money, even though he should have put himself into such a situation, as to entitle the defendant to judgment as in case of a nonsuit; and to this extent, the practice in both courts was conformable to each other (b). There was some difference, however, between the prac-

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(a) 2 M. and S. 335.—(b) *Seymour v. Bridge*, 8 T. R. 408. *Barnes*, 280; 283; 284; 287.

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Tuesday,  
May 2.

HAGEDON v. LAING.

*A.* puts goods up to auction, one of the conditions of sale being, that the goods should be taken away at the buyer's expense, within fourteen days; in default of which, the deposit to be forfeited, the goods to be resold, and the loss to be made good by the purchaser at the auction.—*B.* buys the goods, and a bought note is then entered into with this clause; '14 days for receiving and delivery.'—*Held*, that the meaning of the two contracts (the conditions of sale, and the bought note) was, that the 14 days should be allowed to the purchaser only; and that the vendor should have been always ready to deliver them on request.

*Semb.* That this was not a contract to entitle *A.* to recover on the count for goods bargained and sold;—or at least that he was not so entitled, after having resold the goods.

THIS action, as appeared by the particular of the plaintiff's demand, was brought to recover the sum of £60 8s. 1d. with interest, being the loss which arose to the plaintiff upon a resale of about ten tons of damaged hemp, purchased by the defendant at a public sale, on the 20th of *September*, 1814. The *first* count of the declaration was founded on the bought note hereinafter set forth; but as that count included two different quantities of hemp, one of which did not belong to the plaintiff, he was obliged to resort to the *second* count, which stated that the plaintiff, on the 20th of *September*, 1814, put up to sale, by public auction, seven lots of damaged hemp, and one lot of damaged hemp, subject to the following conditions:—1st, That the highest bidder should be the buyer, and should pay a deposit of £20 *per cent*;—2dly, The lots to be taken with all faults, and cleared away at the buyer's expense, in 14 days from the day of the sale, and the remainder of the purchase money to be paid on or before the delivery of the goods;—3dly, If any of the lots should remain uncleared after the time limited, the deposit to be forfeited, the lots resold, and the loss, and all other charges, to be made good by the purchaser at the present sale. The declaration then stated, that the defendant became the purchaser for the sum of £600, and that although the plaintiff, during all the 14 days, was ready and willing to deliver the said hemp to the defendant, upon his paying for the same; yet the defendant, not regarding the said conditions of sale, nor his undertaking, &c. did not, nor would, within 14 days, clear away the said lots, or pay to the plaintiff the said purchase money; and thereupon the plaintiff, after the said 14 days, again exposed the said goods to public auction, and

they were resold at a loss of £100. The declaration also contained the common counts for *goods bargained and sold*, and the money counts. The cause was tried at the sittings after last *Hilary* term, at *Guildhall*, before Lord Chief Justice *Gibbs*, when it appeared that the defendant had demanded the goods on the day after the sale, but that the plaintiff was unable to deliver them, in consequence of his not having made his post-entry at the custom-house; on which the defendant objected, that by the conditions of sale, the plaintiff was bound to deliver the goods at any time. To this it was answered by the plaintiff that though, according to the conditions of sale, it might be incumbent on him to have the goods ready for delivery immediately after the sale; yet, that it was competent to the parties to vary the terms of those conditions by any subsequent contract; and that they had been varied by the terms of the bought note, which was as follows. ‘Bought at Mr. *Roscow*’s public sale, this day, for Mr. *J. Laing*, lot 6, about eleven tons of damaged hemp, at £45 15s. per ton, and lots 28 and 29, about three tons do., at £45 per ton. To be paid for in money, allowing  $3\frac{1}{4}$  per cent. discount, and 14 days for receiving and delivery.—London, 30th of September, 1814.’ This note, the plaintiff contended, gave him 14 days for delivery, as well as to the defendant for receiving the goods;—but he insisted that, at all events, he was entitled to recover on the count for goods bargained and sold. To the latter argument, the defendant replied, *first*, that the plaintiff could not give the bought note in evidence on the second count, because that count was founded on the conditions of sale only;—and *secondly*, that a count for goods sold could not be supported after a resale of the goods, and also that it would be a variance from his particular of demand, above stated.—The Chief Justice observed, that on the face of the conditions of sale,

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there appeared to be no impediment to an immediate delivery, and that it must therefore be taken that the purchaser was entitled to call for a delivery at any time within the 14 days; and that, as the plaintiff had failed to comply with that demand, the contract had been violated by the plaintiff himself. With respect to the bought note, his lordship observed that it was a question of construction, whether that instrument, which varied, as it was competent for the parties to do, from the conditions of sale, and which was the final contract between the parties, allowed the plaintiff 14 days for delivery.—His lordship directed a verdict for the plaintiff, subject to the opinion of the court, whether the bought note made any difference in the construction of the conditions of sale; and also, whether the plaintiff were entitled to recover on the count for goods bargained and sold.

Mr. Serjt. *Best* having, accordingly, on a former day, obtained a rule *nisi* to set aside this verdict and enter a nonsuit,

The *Solicitor-General* now shewed cause against it. He would not attempt to contend, that the bought note was applicable to the second count, but he insisted that it would entitle the plaintiff to recover on the count for goods bargained and sold; for if that count could be maintained at all, it might be founded on any contract, which should be considered as the ultimately binding contract. [Lord Chief Justice *Gibbs*.—You had better first prove, that you can go upon that count at all.] He admitted, that if the plaintiff had sold the goods, before the contract had been completely rejected by the purchaser, the action could not have been maintained for goods bargained and sold; but he contended, that it was not less a contract for goods bargained and sold, because, after such rejection on the part of the buyer, the vendor had resold them; though that circumstance might make

considerable difference as to the sum to be recovered. He then cited *Mertens v. Adcock* (a), which was an action on the case for not taking away goods sold by auction, and for the loss on the resale of them.—Lord *Ellenborough* held, that the plaintiff was entitled to recover on the count for goods bargained and sold, though he was not in a condition to deliver them; and that when he had so recovered, he would be liable to an action of trover by the defendant for them; for that, as soon as the lot was knocked down to the defendant, he became the buyer, and the goods were goods bargained and sold.—The *Solicitor-General* then contended, that the vendor would have an equal right to resell on the purchaser's default, though it had not been specially introduced in the conditions of sale; or, otherwise, he would be obliged to keep them for ever; but such right would not interfere with his remedy over against the purchaser, except as to the quantum of damages. Then, as to the particular of the plaintiff's demand, he contended, that it afforded no objection to his recovering as for goods bargained and sold. The intent of the particular was not, he said, to specify the count on which the plaintiff intended to rely; for then the particular must be as special as the declaration itself; but only to point out the object sought to be recovered by the action;—provided, as in the present case, the declaration contained but one distinct cause of action. Supposing, then, the plaintiff to be entitled to recover on this count, the only remaining question was, as to the construction of the bought note; and whether it did not give 14 days to each party. He contended that it did, and that the vendor was not bound to have the goods ready on any occasion, when the purchaser chose to ap-

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(a) 4 *Exp. Rep.* 251.

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ply for them. He observed, that this was not a case of absolute refusal to deliver the goods, which, he admitted, would have repudiated the contract.

Mr. Serjt. *Best*, *contrà*, was stopped by the court.

Lord Chief Justice GIBBS.—The main question in this case is on the construction of the contract, which is to be collected from the two documents. We think that, taking them together, the intention of the parties was, not that the vendor should have till the last moment to deliver them, but that the purchaser should have the 14 days to take them away;—that the vendor should be ready at all times, but that the purchaser should have this time allowed him, by way of indulgence. Being of this opinion on that point, it is unnecessary to decide the others. I should hesitate before I overruled any decision of my Lord *Ellenborough's*, even at *nisi prius*; but I cannot entirely accede to the doctrine contained in *Mertens v. Adcock*; I much doubt whether this can be considered, in any way, as a case of goods bargained and sold. It is a contract, that the goods shall be delivered at a certain price, provided the purchaser take them away within a certain time; and I can scarcely think that that amounts to a general contract of bargain and sale. At least, it appears to me, that it must be with this qualification,—that if the vendor resell the goods, he rescinds the contract; for such resale is the strongest proof that he means to desert his contract of general bargain and sale, if any such exist, and resort to his special remedy given by the contract. I only say this, that I may not be supposed to accede to Lord *Ellenborough's* doctrine in *Mertens v. Adcock*.—On the principal question, we think the plaintiff is not entitled to recover.—*Per Curiam*,

Rule absolute.

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PERCY SHELLY, plaintiff, and JOHN MILLER and wife,  
deforciant.

WILLIAM JOHNSON, plaintiff, and JOHN MILLER and wife,  
deforciant.

Wednesday,  
May 3.

MR. Serjt. *Blosset* moved to amend the entries in the different offices of these two fines, the original indentures having been lost; the first of which was levied in the 33d of *Geo. 2.* of one-third part of certain lands in *Old Brentford*; the second in the 31st of *Geo. 3.* of a moiety of another third part of the same lands, making together one undivided moiety. The amendment prayed was, that the lands should be stated to be situated 'in *Old Brentford*,' instead of 'in the parish of *Old Brentford*,' there being no such parish. In the deed to lead the uses of the first fine, the premises were stated correctly to be 'in *Old Brentford*;' in that of the second fine, the same error had occurred as in the fines themselves.— In support of the motion, he cited *Flower v. Bainwright* (a), where the court amended a recovery, by substituting the parish of *East Ardesly* for the parish of *Ardesly* in the county of *York*; though the deed to make the tenant to the præcipe described the premises merely as lying in *Ardesly*, upon an affidavit that the vouchee was seized of the lands in question in *East Ardesly*, and that he was seized of no lands in any parish called *Ardesly*.

Two fines of different shares in the same lands amended, by stating them to be situated in 'A.', instead of 'in the parish of A.', there being no such parish;—the deed to lead the uses of the former fine being correct; that of the latter containing the same mistake as the fines.

The court, under all the circumstances, one of the deeds containing a correct statement, allowed the amendment, considering the loss of the indentures as making no difference in the case;—but the Chief Justice observ-

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(a) 5 *Taun.* 303.



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ed, that the mischief was, that on each of these cases of amendment, fifty others might be engrafted.

Amendment allowed. (a)

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(a) *Vid. antè*, 468.

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Wednesday,  
May 3.

LEIGH, Esq. and another v. BERTLES.

Where bail above are put in, but not justified; and the sheriff, being fixed, brings an action on the bail-bond, to which the defendant pleads *comperuit ad diem*; the court will, on motion by the sheriff, order the recognizance of bail in the original action to be struck off the file; though the defendant allege that the sheriff was fixed through his own negligence; for that should be the subject of motion to stay the proceedings on the bail-bond.

THIS was an action by the sheriff of *Middlesex*, upon a bail-bond, which had been entered into by the defendant, in a cause of *Broadfoot v. Elderbeck*, and to which the defendant pleaded *comperuit ad diem*.

Mr. Serjt. *Best*, on a former day in this term, obtained a rule, calling on the defendant in this action, to shew cause why the recognizance of bail, in the cause of *Broadfoot v. Elderbeck*, should not be taken off the file.—He moved on an affidavit of the plaintiff's attorney, which stated, that it appeared by the filacer's book, that special bail had been put in, in the original action, on the 11th of *November* last; that on the 24th of the same month, an exception was entered to them; but that no bail had justified, and that the sheriff, the plaintiffs in the present action, had been compelled to pay to the plaintiff in the original action the sum of £87:6s.—He observed that if bail, after they had been rejected, should still be permitted to remain on the filacer's book, they might, in an action on the bail bond, plead that they had appeared, and the filacer's book would prove that plea. It appeared, that it was usual for the filacer to enter the bail, and the exception to them, in his book; and that the re-

cognizance was entered on the roll, though the bail should not justify.

The *Solicitor-General* now shewed cause against the rule, on an affidavit of the present defendant's attorney, which stated, in substance, that the action, under which the sheriff had been compelled to pay the debt in the original action, had been commenced in consequence of the negligence of the sheriff's officer, in not carrying the bail-bond into the office in due time.

Lord Chief Justice GIBBS.—When bail are excepted to, they are as no bail, till they have justified; how then can we leave these bail on the file, when there would be an illegal effect resulting from it; for if they remain, they would be conclusive evidence of the return of the writ. The question is, not whether the sheriff have misconducted himself, but whether a recognizance of bail, which ought not to remain on the roll,—because standing where it does it testifies a falsehood,—shall be permitted to remain, in order to make out the defendant's plea at the trial. Any cause of complaint, which the defendant may have against the sheriff, may be the subject of motion to stay the proceedings on the bail-bond; but as it is, the sheriff has no opportunity of answering the ground on which the defendant shews cause. At all events, however, the recognizance should be taken off the roll, because it is not true.

The rest of the court concurred.

. Rule absolute.

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Wednesday,  
May 3.

A declaration, stating that the defendant published of the plaintiff a false and malicious libel, *purporting thereby* that the plaintiff's beer was of a bad quality, and deficient in measure, whereby he was injured in his credit and business.—*Held* bad, on general demurrer.

## WOOD v. BROWN.


THIS was an action for a libel, and the declaration, after the usual inducement of good character, and stating that the plaintiff carried on the trade of a victualler, and had never been suspected of selling beer and other liquors of a bad quality, alleged "that the defendant falsely and maliciously published, of and concerning the plaintiff, in his said business, a certain false, scandalous, malicious, and defamatory libel, *purporting thereby* that the plaintiff's beer was of a bad quality, and sold by deficient measure, and that his other liquors and the treatment of his guests were bad, and that his house was, from those circumstances, a nuisance, and therefore that another public-house was much wanted by the neighbourhood. The second count stated, that the libel purported that the beer was of a bad quality, and sold by deficient measure. By means of the publishing of which libels, the plaintiff was injured in his credit, and in his said business." To this declaration, the defendant demurred generally, the plaintiff joined in demurrer, and on a former day in this term, the case came on for argument.

Mr. Serjt. *Lens*, in support of the demurrer, observed that this was quite a new mode of declaring, and was an attempt, by not setting forth the words of the libel, to prevent the court from judging whether the expressions complained of amounted to a libel or not; the plaintiff had taken on himself to draw his own conclusions on the subject.—He cited *Zenobio v. Axtell* (a), where it was decided, that in an action for a libel written in a foreign language, the plaintiff must set forth the libel in the original language; and *Maitland v. Goldney* (b), where the

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(a) 6 T. R. 162.—(b) 2 East. 426.

court held, that in a plea of justification of slander, which stated that the defendant named the original author of the slander at the time, it was not sufficient to allege that the original slanderer used such and such words, *or to that effect*. [Lord Chief Justice *Gibbs*.—Without prejudice to any thing else that may be urged in support of the demurrer, I think we ought to hear the other side.]

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Mr. Serjt. *Best*, accordingly, observed that the *first* question was, whether it were necessary to set out a libel according to its *tenor*, or according to its *substance*. In the case of *The Queen v. Drake (a)*, Lord C. J. *Holt* said, that there were two ways of describing a libel, or other writing, in pleading; either by the words, as if one declare of a libel *cujus tenor sequitur*, &c. where it is described by its particular words, or by the sense and meaning;—‘thus it is a good information to shew that the defendant made a writing, and therein said so and so, translating it into *Latin*; in which case, exactness in words is not so material, because it is described by the sense and substance of it.’—This, he said, was a direct authority to shew that it was not necessary to state the exact words. If this declaration were to be considered bad, it would impugn the validity of a great many cases on the subject;—it was a very common thing, he said, in an action for slander, to say generally, that the defendant had imputed felony to the plaintiff.—[Lord C. J. *Gibbs*.—But that means a legal charge of felony before a magistrate, according to Mr. Justice *Buller’s* opinion, which I have heard him deliver to that effect.] The *second* ground, however, on which he meant principally to rely, was, that this objection could not, at all events, be taken advantage of on general demurrer. The words of stat. 27 *Eliz. c. 5*. were, ‘that judgment should be given according

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(a) 2 *Salk.* 660. 11 *Mod.* 95 *S. C.*

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'to the right of the cause, without regarding any imperfection, defect, or *want of form* in the pleadings, &c., except those which should be specially set down.' If, therefore, the declaration were sufficient to shew that the plaintiff had a cause of action, but that cause of action were informally set forth, the defendant must demur specially. No one could doubt that the imputation alleged in this declaration was a sufficient cause of action, and if there were any irregularity in the mode of statement, that would be mere matter of form, and would not go to the ground of the action.

Mr. Serjt. *Lens*, in reply, insisted that this could not be considered as mere matter of form, within the meaning of the stat. of *Eliz.*; which, he said, only related to the want of form in what was stated on the face of the declaration:—In the present case, the declaration stated nothing; it did not allege that the libel contained any one specific allegation. [Lord C. J. *Gibbs*.—It must be confessed, that what Lord C. J. *Holt* says in *The Queen v. Drake* furnishes a very strong argument, that it is sufficient to set forth the sense and substance.] Here, however, the plaintiff had neither stated the words nor the substance;—he had merely stated the conclusions which he himself had drawn from the supposed libel, and which might be very different from those which the court would draw from it. Even the late libel act (a) did not preclude the necessity of stating the libel itself on the record; it only left it to the jury to say, under the judge's direction, whether the words set forth amounted to a libel or not. [Lord C. J. *Gibbs*.—The plaintiff might

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(a) 32 Geo. 3. c. 60, which enacts 'that on an indictment or information for a libel, the jury may give a general verdict on the whole matter in issue, and shall not be required by the court to find the defendant guilty merely on proof of the publication, and of the sense ascribed to it in the information; but that the court shall give their directions to the jury, as in other criminal cases.'

certainly prove the whole of this allegation, without stating one word that was contained in it, if this declaration be good. We will consider of this case;—I certainly have always thought that it was necessary to state the libel.]

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*Cur. ad. vult.*

On this day, his lordship delivered the opinion of the court.—We have looked into this case, and into the other cases on the subject; and though, in some of the cases, there are expressions which have carried this doctrine further than was at first intended, we think it is impossible that this declaration can be supported. It charges the defendant with publishing a libel, *purporting* as is therein stated. In all *actions* for libels, it is the province of the court to say whether the expressions complained of amount to a libel or not; and if this mode of declaring could be supported, the court would lose that jurisdiction, and it would be given to the jury.—There is no case which goes the length of saying that this declaration is good;—we think, therefore, that it cannot be supported.

Judgment for the defendant. (a)

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(a) See *Starkie* on criminal pleading, 116 *et seq.* where *The Queen v. Drake*, and the other cases on this subject, are fully considered.

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GOODSON and another *v.* FORBES.

Friday, May 5.

**THIS** was an action on a policy of insurance, with a count in the declaration on an award, made by an arbitrator, to whom it was stated that the defendant, together with several underwriters on a policy entered into an agreement to refer the cause to arbitration, that agreement and the award require, each, but one stamp;—there being a community of interest between the parties in the subject-matter.

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ther with several of the other underwriters, had agreed to refer the question. At the trial of the cause at *Guildhall*, at the sittings after last *Hilary* term, before Lord Chief Justice *Gibbs*, the agreement to refer and the award were produced, the former of which documents was in these terms.—‘ We hereby agree to leave the ‘ claim on the within policy to the decision of Mr. ‘ *A. M. S.* and Mr. *W. L.* of *Lloyd’s*, with liberty to call ‘ in a third arbitrator; and the award of them, or any ‘ two of them, shall be final, and determine with regard ‘ to any point of law that may come before them.— ‘ Signed by the defendant, and several of the other underwriters.’ It was objected by Mr. Serjt. *Best*, on the part of the defendant, that those instruments could not be given in evidence, having, each of them, but one stamp. His lordship, however, overruled the objection, and alluded to the case of *Baker v. Jardine* (a), where the court of *K. B.* held, that an assignment of the prize-money of several seamen on board a privateer, being payable out of the same fund, required but one stamp.—The jury found a verdict for the plaintiffs.

Mr. Serjt. *Best*, on a former day in this term, moved for a rule *nisi* to set aside this verdict, and enter a nonsuit. He distinguished the present case from that of *Baker v. Jardine*, and also from that of *Davis v. Williams*, because he said that in those cases there was a community of interest between the parties; whereas, in the present case, all the interests were separate, and the use to be made of the award was separate, of which the present action was a proof; for if the award had been made between the plaintiff and all the underwriters jointly, it could not have been given in evidence in an action against the present defendant only. In the case

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(a) *Trin.* 1784 *B. R.*, cited in *Davis v. Williams*, 13 *Best*, 235.

of *Doe*, lessee of *Copley*, v. *Day* (a), it was objected that an agreement for different distinct demises to different tenants had but one stamp; and though the court decided on the facts, that that was sufficient, it having been intended to apply it to one demise only, Lord *Ellenborough* said expressly, 'that if the instrument had been required to substantiate the several contracts, no doubt there should have been a stamp to each, though the same terms of agreement applied to all.' He also cited *Gilby* v. *Lackyer* (b), where the court held that several defendants could not be held to bail in different actions, on one affidavit; considering it to be a fraud on the stamp duties.—The court granted a rule *nisi*, and on a subsequent day,

The *Solicitor General* shewed cause.—He contended that, though the interests of the different underwriters were distinct, they related to the same subject-matter; and therefore, that one award with one stamp was sufficient, though the remedy on the award, as to each, must be distinct;—so, where an arbitrator awarded specific sums to be paid by different creditors to the same person. And this, he said, was the distinction taken in all the cases which had been mentioned; viz. where the interests of the different parties, though distinct, related to the same object; and where they related to different objects. The same argument, he said, applied to the agreement to refer; for if it were necessary that one of these instruments should have had separate stamps, the other should have had them likewise. He compared this to the case of a man compounding with his creditors;—in that case, the debtor enters into an agreement with different persons, the demand of each being different and distinct; yet it had never been decided that it was ne-

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(a) 13 *East*, 241.—(b) *Doug*, 217.



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*Davis v. Williams*.—In the case of *Copley v. Day*, on the contrary, supposing the stamp to have been applicable to different demises, there would have been neither a community of interest, nor of subject-matter. So in *Gilby v. Lockyer*, the transactions were separate and distinct in their origin; and in fact, they were so many separate and distinct affidavits.—He concluded by observing that the result of all the cases on the subject would be found collected in Mr. *Phillips's* Law of Evidence, 263, *et seq.*

Mr. Serjt. *Best* and Mr. Serjt. *Vaughan*, *contra*, would not deny the principle laid down down in *Phillips*, nor that of the cases which had been cited by the other side; but contended that, in the present case, there did not exist that community of interest which had decided those cases.—There was this distinction, they said, between those cases and the present; that in the former, the interests of the parties were united by the agreement, though they had been previously distinct; here, however, the interests still remained separate, for if any use

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contended, might as well take one bond from  
sons engaged at it. The case of the debtor con  
ing with his creditors fell within the same princ  
—viz. that there was one consolidated object.—In th  
case of consolidation rules in policy causes, they said, it  
was necessary to have as many stamps as underwriters;  
and they contended that the present was a still stronger  
case; for the object of the consolidation rule was to de  
cide all the causes by the event of one; whereas here,  
there must be separate actions against all the under  
writers, as if no award had been made. [Lord C. J.  
*Gibbs*.—The consolidation rule is a rule in each cause.]  
They concluded by observing that, if these instruments  
should be considered as valid, the revenue would lose all  
the advantage arising from different stamps on the same  
instrument.—The Chief Justice, after observing that this  
was an important question, said that the court would  
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On this day, his lordship delivered the opinion of the court.—The objection to the plaintiff's case is, that, as the award and agreement to refer included the interest, not only of the defendant, but of several of the other underwriters, there ought to have been as many stamps as underwriters; because each was a separate contract between the insured and each underwriter, and therefore, there were, in effect, as many separate agreements and awards as underwriters.—We have considered the question, and the cases which have been cited; and we think it impossible to decide that more stamps than one were necessary, without disturbing the principle which has always been acted upon in all the courts. It is not disputed that one stamp is sufficient for the composition deed, into which an insolvent enters with his creditors: now each creditor has only a separate remedy against the insolvent;—the creditors have no joint legal interest;—still it has always been considered that one deed is sufficient, and that has always been given in evidence, and acquiesced in. On what principle has it been acquiesced in? Not that the interest is throughout joint; but that there is a subject-matter, in which the creditors have all a common interest, and out of which a payment is to be made; and on that ground it has always been considered that one stamp is sufficient.—In *Baker v. Jardine*, a number of mariners conveyed their interest to a third person; it was there held that, though in asserting their legal claim, they must have sued separately; yet that there was such a community of interest among them all, in what was to produce the fund, that it was competent for them to assign that interest by one deed only. So in *Davis v. Williams*, it was held that one stamp was sufficient, because, though the parties might acquire separate interests, or subject themselves to separate obligations, yet there was but one loan, which formed the

subject-matter of the agreement. Now, what is the nature of the present action?—There is an agreement between the insured and all the underwriters on the policy;—this action is against one only;—all have a community of interest in the matter insured, for all have an interest in its preservation, and none of them would be answerable to the insured, as long as it remained secure. It is true that each is only answerable for his own subscription in a court of law, and that the case of one cannot be mingled with that of another, in a question relating to the claim of each; but all are equally interested in the subject-matter. By the terms of the agreement, it is manifest that the parties treated this claim as one in which all were equally concerned, though their interests varied according to the different proportions of their subscriptions.—Now, this is such a community of interest, that, according to all the cases which have been decided, we think that one stamp was sufficient; and therefore, that these instruments were properly received in evidence. I have omitted to say any thing respecting the case of *Bowen v. Ashley*, because there appears to be a difference of opinion, as to the effect of the bond in that case;—the one side contending that each obligor was answerable for the others;—the other side, that each had entered into a separate agreement, independently of each other. It is not material to say which was the right construction, because there was an obscurity in the facts, which makes it no authority for the present case.

Rule discharged.

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Friday, May 5.

SIDNEY, demandant, HULME, tenant, and AUSTIN, and another, vouchees.

Recovery amended by inserting the parish of *A.* after that of *B.*, in which the whole of the lands to be conveyed were described to be situated:—Part of the lands being situated in *A.*; that part being particularly described in the deed, and no land, answering to that description, being in the parish of *B.*:—Though the parish of *A.* was not mentioned in the deed to make the tenant to the præcipe.

THIS recovery was suffered in *Trinity* term 53 *Geo.* 3, of an estate called *Knighton Park farm*, and other lands, in the county of *Dorset*, by the description of 20 messuages, &c. &c., with the appurtenances, in *Great Canford*.

Mr. Serjt. *Bosanquet* now moved that this recovery should be amended, by inserting the parish of *Ham-Preston* after *Great Canford*, upon an affidavit, which stated that a piece of pasture land, part of the estate called *Knighton Park farm*, was situated in the parish of *Ham-Preston*, and not in *Great Canford*. The deed for making the tenant to the præcipe did not, he admitted, mention the parish of *Ham-Preston*; but the spot in question was very particularly described in the deed, being in these words;—‘The Cowleaze, containing 6 acres, 3 roods, and 31 perches, and a piece of pasture land, formerly a part of *Morrice’s Ham*, but now thrown into, and forming part of the Cowleaze, and containing 2 roods, 33 perches’—after a description of the other parcels of land, were the following general words;—‘all which said messuage, lands, and hereditaments, are situate, lying and being in the parish of *Great Canford*. In the county of *Dorset*, and were late, and now are, in the tenure of *C. H.*, or his under tenants; and the same do, together with the two cottages and hereditaments, hereinafter described, form or make the farm, commonly called or known by the name of *Knighton Park farm*.’ The affidavit stated that there was no part of *Knighton Park farm*, which answered to the description of ‘a piece of pasture land,’ &c. as above stated, in the

parish of *Great Canford*. The court, on the authority of  
*Lamb v. Reaston* (a),

1813.

Allowed the amendment.

(a) *Suprà* 23.

JACKSON v. lord MILSENTOWN.

Monday, May 8.

MR. Serjt. *Vaughan*, on a former day in this term, moved for a rule, calling on the plaintiff to shew cause, why the judgment entered upon the warrant of attorney, given by the defendant, together with a deed and bond, all dated the 14th of *May*, 1804, for securing an annuity of £218 15s. to the plaintiff, should not be set aside; on the ground that the memorial was defective in several particulars.—The *first* objection was, that the memorial did not state the defeazance to the warrant of attorney; in support of which objection he cited the case *Ex parte Ansell* (a), where it was held to be necessary to state the terms and conditions of the proviso of redemption, contained in the deed.—The *second* objection was, that the memorial did not state that the defendant had bound his heirs, executors, and administrators, according to the deed and bond, which, on the authority of *Horwood v. Underhill* (b), and *Denne v. Dupuis* (c), he contended was necessary.—The *third* objection was, that the memorial stated the deeds to have been executed on or

It is no ground for impeaching an annuity, that the memorial does not state the defeazance of the warrant of attorney in the recital of that instrument; it being explicitly set out in the recital of the deed:—Or that the memorial does not state that the grantor had bound his heirs, &c., according to the deeds:—Or that it states the deeds to have been executed on or about such a day; they having, in fact, been executed on that day.

(a) 1 B. & P. 62.—(b) 10 East, 123.—(c) 11 East, 34.

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*about* the 14th of *May*, which, he contended, was not a sufficiently positive statement to satisfy the act (a). The court, however, observed that though, if the deeds had not been executed on that day, the statement would have been insufficient; yet that, as that was the real date of the instruments, the words '*or about*' might be rejected as surplusage. The rule was accordingly granted on the two former grounds only, and on this day,

Mr. Serjt. *Best* shewed cause against it. As to the *second* point, the judgment of the court of *K. B.* in the case of *Horwood v. Underhill*, which had been cited in support of the objection, had been reversed on writ of error in the *Exchequer Chamber* (b), and it was decided that the memorial need not state that the heirs, &c. of the obligor were bound by the bond.—Mr. Serjt. *Vaughan*, accordingly, gave up that point.—With respect to the *first* objection, it appeared that the defeazance of the *deed* was thus recited in the memorial;—'And it is by the said indenture declared and agreed, that the said bond and warrant of attorney, and the judgment to be entered up by virtue thereof, and also this indenture, were respectively given for securing one and the same annuity of £218:15s.; and that no execution should be taken out on the said judgment, until the annuity should be in arrears for forty days.' Mr. Serjt. *Best* contended, that this was a sufficient statement of the defeazance of the warrant of attorney, though it occurred in the recital of a different instrument; and that it was not necessary to set out the same thing twice. (c)

Mr. Serjt. *Vaughan*, being called upon by the court to support his rule, said that the case *Ex parte Ansell* had decided that it was necessary to insert in the memorial the de-

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(a) *Vid. supra* 482. note (a).—(b) 4 *Taun.* 346.—(c) *Vid. ante Brown v. Rose*, p. 478, the first point there made.

feazance of the warrant of attorney : Here it had not been set out as part of that instrument, and the question was, whether that defect were remedied by its appearing in the recital of another instrument.

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Lord Chief Justice GIBBS.—It would be monstrous to set aside an annuity for such an objection as this. The object of the act was, that the whole of the transaction should appear ; the part which is here alleged to be concealed, is the defeazance. The case *Ex parte Ansell* certainly requires that the defeasance should be stated in the memorial ; but it by no means goes so far as to say, that this statement would not be sufficient. I do not mean to lay down any general rule, which shall be drawn out to any other case that may not be exactly similar ; my opinion only is, that the manner in which the information is given to the party by the memorial, in this case, is sufficient.

The rest of the court concurred.

Rule discharged, but without costs.

FENTON v. ELLIS.

Monday, May 8.

THE *Solicitor-General*, on a former day in this term, obtained a rule to shew cause, why the bail-bond in this action should not be given up to be cancelled, on entering a common appearance, on the ground of the insufficiency of the affidavit to hold to bail ; which stated ‘ that the defendant was justly indebted to the plaintiff, in the sum of £100 and upwards, for goods sold and appraised to the defendant ;’ without stating ‘ by the plaintiff.’

Mr. Serjt. *Best* now shewed cause against the rule, and contended that the affidavit was sufficient ; for there was

In an affidavit to hold to bail, it is not sufficient to state the debt to be ‘ for goods sold and appraised to the defendant,’ without saying ‘ by the plaintiff.’ And the court will not suffer an affidavit, thus defective, to be amended.



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 v.  
 ELLIS.

enough stated in it to convict the plaintiff of perjury, if it were false; and he asked, by whom could the goods have been sold to the defendant, except by the plaintiff? He cited *Hulton v. Eyre* (a), where the court held it sufficient to state the defendant to be indebted for money paid to the use of the defendant, without alleging that it was *at his request*. At all events, however, the court would allow the plaintiff to amend his affidavit.

The *Solicitor-General*, *contra*, observed that the case of *Hulton v. Eyre* bore no resemblance to the present; but in *Cathrow v. Hagger* (b), and *Taylor v. Forbes* (c), there cited and confirmed, the same objection was made as in the present instance; and the court of *K. B.* held it fatal.

Lord Chief Justice GIBBS.—In *Hulton v. Eyre*, the application was made on the ground, that the affidavit, which was for money paid to the use of the defendant, did not also state that it was at his request; and the court considered that that was not necessary; but they distinguished that case from those which have now been cited from the *King's Bench*. As to the amendment, we see no ground for permitting that;—the court is very tender of using the discretionary power which they possess, of allowing amendments in cases of this kind.

Rule absolute.

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(a) *Supra*, 315.—(b) 8 *East*, 106.—(c) 11 *East*, 315.

1815.

SAMUEL BAKER and PHOEBE his wife, and GEORGE EGGLE-  
SON and CATHERINE his wife, v. DANIEL and others.

Monday, May 8.

THIS was a proceeding on a writ of partition of certain lands, which were situated in the county of *Kent*, and which had descended to three daughters in fee, in default of male heirs. The declaration stated the facts correctly; viz. that the lands came to *Phæbe*, *Catherine*, and *Elizabeth*, as daughters and co-heirs of the person last seised; their respective marriages; and that the husbands and wives, in right of the wives, became seised of undivided thirds, in their demesne as of fee; but concluded thus: 'Whereof to the said *Samuel* and *Phæbe*, in right of the said *Phæbe*, and the heirs of their bodies begotten, doth belong to have one-third part, &c.'—And so to the plaintiff *Eggleson* and his wife; giving them estates tail, instead of estates in fee. It was then stated on the roll that the defendants made default, whereupon judgment was given that partition should be made, and that the sheriff should cause the lands to be divided into three equal parts, and should deliver one to each of the three parties, to be holden in severalty; without stating the *quality* of their estates. The sheriff then returned his inquisition; which return, in reciting the writ of partition, contained the same mistake as the conclusion of the declaration, assigning to the plaintiffs their respective proportions as estates tail.

Declaration on a writ of partition, and the sheriff's return, amended, by striking out an erroneous description of the *quality* of the estates conveyed to the different parties.

Mr. Serjt. *Lens*, on a former day in this term, moved to amend the legal result of the facts at the end of the declaration, and also the return of the sheriff, by inserting the words '*and the heirs of the said Phæbe*,' instead of the words '*and the heirs of their bodies begotten*.' The Chief Justice, however, inquired whether there were any case in which the court had amended the sheriff's return; his lordship doubted whether the court had any

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such authority, and observed, that it would in fact be making the return for the sheriff. The court requested the learned serjeant to see if any case were to be found on the subject; and accordingly on this day, he admitted that he could find no precedent for amending a writ of partition, but contended, that this fell within the principle on which the court amended fines and recoveries. He admitted that the court would not allow of amendments, except on special grounds; the ground on which the amendment was prayed in the present case was, that the judgment was correct; for in *Rastal's* (a) and *Cole's* (b) entries, no notice was taken of the quality or quantity of the estate of each party;—the form was, merely to award a third part to each, to be held in severalty. With respect to the return of the sheriff, he observed, that the court had amended the return to the writ of seisin in a recovery (c).—The court, however, being still doubtful as to the propriety of amending the sheriff's return, he proposed to strike out the description of the estate altogether,—which, he observed, was mere surplusage,—both from the declaration, and from the sheriff's return; and the court, considering that there could be no material objection to this course,

Allowed the amendment, by striking  
 out the description of the estate.

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(a) *Tit. partition*, 449, 450.—(b) *Tit. partition*, 411.—  
 (c) *Watson v. Lockley*, 2 *Wils.* 2; *Scott v. Perry*, 3 *Wils.* 206.;  
 2 *Bl.* 758. *S. C.*; *Barnes*, 23.

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PROTHERO V. THOMAS.

Monday, May 8.

THIS action was brought to recover the sum of £17:14s. for money paid to the use of the defendant, and was tried before Mr. Baron *Richards*, at the last assizes for the county of *Monmouth*; when it appeared that the plaintiff was an attorney at *Newport*, in that county; that in the year 1810, being at that place, and meeting the defendant in custody, at the suit of a Mr. *Prosser*, for a debt of £10, he, after satisfying himself that the debt was due, consented, at the request of the defendant, to give an undertaking to pay the debt and costs; and that he was accordingly debited with the amount by *Prosser's* attorney, with whom the plaintiff had a running account, and to whom he paid the debt and costs in *May* 1813, without previously having had the costs taxed.—The plaintiff was not concerned in the action by *Prosser*. It was objected, on the part of the defendant, that the plaintiff's claim fell within the meaning of stat. 2 *Geo.* 2, c. 23, s. 23. (a), and therefore, that he should have delivered his bill to the defendant, a month previously to the commencement of this action. In support of the objection, *Crowder v. Shee* (b) was cited, which was an action by an attorney against an underwriter for his bill, in defending an action by the insured; and Lord *Ellenborough* held,

*A.*, an attorney, at the request of *B.*, who is in custody for debt in an action in which *A.* has not been concerned, gives an undertaking for the debt and costs, which he accordingly pays to the plaintiff's attorney, without having the costs taxed.—*Held*, that this was not a disbursement by *A.* as an attorney, within the meaning of 2 *Geo.* 2. c. 23. s. 23.

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(a) By that section it is enacted, 'That no attorney or solicitor shall commence or maintain any action or suit, for the recovery of any fees, charges, or disbursements, at law or in equity, until the expiration of one month after he shall have delivered to the party, charged therewith, a bill of such fees, charges, or disbursements, written in a common legible hand, and in English, (except law terms and the names of writs), and in words at length (except times and sums), which bill shall be subscribed by such attorney or solicitor.'

(b) 1 *Camp.* 437.

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that the plaintiff, not having delivered his bill, was not entitled to recover even the sum which he had paid to the insured, as his costs awarded him by the court.—The learned judge, however, considering that the plaintiff in the present case had not acted as attorney for the defendant, but had merely advanced the money as any other person might have done, overruled the objection; and the jury found a verdict for the plaintiff.

Mr. Serjt. *Pell* having, on a former day, obtained a rule *nisi* to set aside this verdict, the *Solicitor-General* was now to have shewn cause against it; but the court called on the learned serjeant to support it. He accordingly contended that, under the circumstances of this case, these must be considered as proceedings by the plaintiff as an attorney. The giving an undertaking to put in bail, was what no one but an attorney could regularly do; and the money paid by the plaintiff, as the costs in the original action, which, it appeared, had never been taxed, and which, he said, could not now be taxed, must be considered as a *disbursement* within the act, according to the case of *Crowder v. Shce*. The courts, he said, were always inclined to hold attorneys very strictly to the rule.

Lord Chief Justice GIBBS.—The objection has been supported on the only ground for which there was any colour; but this is certainly not a case within the statute, which only applies to cases where the attorney seeks to recover a compensation for business done, and disbursements made by him, *as an attorney*. This is not an action of that kind, but it is brought for money paid to the use of the defendant, in settling the debt and costs in a former action, in which the plaintiff was not concerned; and though those costs may never have been taxed, the defendant might have applied to the court, and they would have stayed proceedings till they were taxed. Any person, whether an attorney or not, might have entered into

the same engagement that the plaintiff entered into. If the debt which he paid had not been due, that would have been a defence to the action; but he paid this money to the use of the defendant, and his being an attorney makes no difference.

The rest of the court concurred.

Rule discharged.

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ROGERS v. PITCHER.

Monday, May 8.

THIS was an action of replevin, in which the defendant avowed that the plaintiff held the closes in which, &c., as tenant thereof to the avowant, at the yearly rent of £7:10s., payable half yearly, on the 25th of *December*, and the 24th of *June*; and that the distress was made for £15, being two years rent, due the 24th of *June*, 1814. The plaintiff pleaded in bar *non tenuit modo et formâ*.—The cause was tried before Mr. Baron *Richards*, at the last assizes for the county of *Monmouth*, when it was proved, on the part of the avowant, that the lands in question had been the property of a Mr. *Price*, under whom the plaintiff had held as tenant; that *Price*, being indebted to the avowant, executed a warrant of attorney to him, on which a judgment was entered up, and a writ of *elegit* issued in *Hilary* term 1810, by virtue of which the avowant got possession of a moiety of the estate;—the avowant put in a receipt signed by his agent for £6:12s. 6d. from the plaintiff, 'being for a year's rent, for the moiety of the *Ty Coch* farm,' (the estate in question) due at Midsummer 1812; and he also proved that he had received rent for that moiety, for the half-year antecedent to that time.—It was

Where a tenant, by mistake, or misrepresentation, pays rent to a person not entitled to demand it, he is not precluded by such payment from giving evidence, on a plea of *non tenuit*, in replevin against the supposed landlord, to shew that the latter is not entitled to the rent.

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contended, that the payment of rent to the avowant was *prima facie* evidence of a tenancy from him, and therefore, that unless that were contradicted, he was entitled to a verdict; and that the plaintiff could not, on the plea of *non tenuit*, question the title of the person to whom he had paid rent; which, it appeared, was the plaintiff's object in making this replevin. The learned judge, however, reserving this point for the consideration of the court, permitted the plaintiff to go into evidence to rebut the avowant's title, and accordingly a fine, passed in *Hilary* term 1809, of the lands in question, which was prior to the entry of judgment on the warrant of attorney, was put in, and a deed declaring the uses to be for *Sarah Baker*, her heirs and assigns. The cause went to the jury upon the validity of this deed, and they, considering it to be valid, found a verdict for the plaintiff in replevin.

Mr. Serjt. *Pell*, on a former day, obtained a rule *nisi* to set aside this verdict, and enter a nonsuit on the point reserved; contending, that on the plea of *non tenuit*, all that it was necessary to prove was the tenancy.

The *Solicitor-General*, and Mr. Serjt. *Vaughan*, now shewed cause, and contended that the avowant had only a right of possession under the elegit, and therefore was not entitled to distrain for rent; for that the sheriff could not deliver the land extended; according to Lord *Kenyon*, in his judgment in the case of *Taylor v. Cole* (a). [Lord C. J. *Gibbs*.—No doubt the sheriff may deliver it, and the person claiming under the elegit may enter, though he cannot by such entry disturb the tenant in possession. If the landlord himself be in possession, the land is actually delivered over; if he hold it by his tenant, the seigniority only is delivered over.]

(a) 3 T. R. 296.

They then contended, that as, under the circumstances, the rent which the defendant had received must be considered as having been paid under a mistake, the plaintiff was not estopped by such payment from shewing that the defendant was not entitled to demand it. They admitted that in general, a tenant, after having paid rent, could not plead *nil habuit in tenementis*, or dispute his landlord's title; but that rule did not apply to a case where rent had been paid to a person, under a supposition that he was entitled to claim it, which supposition was afterwards rebutted. If the defendant were to succeed on this occasion, there would be a double right to distrain, since the jury had found that the deed, by which the lands had been conveyed to Mrs. *Baker*, was valid.

Mr. Serjt. *Pell* and Mr. Serjt. *Rough*, *contra*, admitted that if the defendant were not the real landlord, he, the real landlord, would be entitled to recover the rent over again; and the plaintiff must chuse her remedy, either by application to a court of equity, or by an action for money paid. But they contended that the payment of rent, even though under a mistake, was such evidence of the *tenancy*, as called upon the plaintiff to rebut it by other evidence; whereas the question that went to the jury was, not the tenancy of the plaintiff, but the title of the avowant; which, they said, was the very evil intended to be remedied by stat. 11 *Geo. 2. c. 19 (b)*. If the evidence, which had been given by the plaintiff, had been put upon

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(b) The 22d section of this statute enacts, 'That it may be lawful for defendants in replevin to avow, or make cognizance generally, that the plaintiff in replevin, or other tenant of the lands where the distress was made, enjoyed the same under a grant or demise at a certain rent, during the time wherein the rent distrained for was incurred, which rent was then, and still remains due, &c., without further setting forth the grant, tenure, demise, or title, of such landlord or lessor, &c.'

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the record, it would have amounted to *nil habuit in tenementis*. In *Sullivan v. Stradling* (a), the law on this subject was fully discussed, and the court held that *nil habuit in tenementis* was a bad plea in bar to an avowry for rent.


Lord Chief Justice GIBBS.—This case has been presented to the court in different shapes, at different stages of it ; but the real facts are, that this estate belonged to *Price*, of whom the plaintiff held as tenant. Afterwards, *Pitcher*, the avowant, procured an elegit to be levied against *Price*, by virtue of which he would be entitled, by the delivery of half the estate by metes and bounds, to one half of the rent ; the other half remaining still due to *Price*. Knowing these facts only, and no more, the plaintiff pays for a time half the rent to *Pitcher*. It turns out, however, that *Price*, being indebted to Mrs. *Baker*, had previously assigned the estate to her. Under these circumstances, it is clear that Mrs. *Baker* may distrain for the rent, and that the plaintiff is answerable to her, as long as the tenancy continues. *Pitcher* contends, that because he had induced the plaintiff to pay the rent to him once or twice, in ignorance too of the facts, she is bound to pay it to him for ever, though she is also bound to pay it to Mrs. *Baker*. Justice speaks very forcibly against such a position ; but if we found any law by which a person, having paid rent on one occasion, was ever after bound by that payment, we must decide accordingly. But there is no such law. Before the statute of *Ann*, the assignee of the reversion could not distrain without attornment ; but it has never been held, that because attornment was necessary to complete the conveyance, attornment alone was sufficient without any conveyance. I did not expect to find any authority to shew the reverse, because the law

was too plain to require it. I have found no case in point on the subject of replevin, but in *Williams v. Bartholomew* (a), the question occurs in another way. "That was an action of covenant for rent, on a demise by *E. B.*, to which the defence was, that the premises were settled on *E. B.* by way of jointure, as long as she should continue unmarried, remainder over; that she did marry, in consequence of which, the defendant had since paid the rent to the remainder-man. The marriage, however, turned out to be void, and the court held that the rent having been paid under a mis-apprehension, the defendant was answerable over to *E. B.*" Now how can that case be distinguished from the present? It is true, that there, the marriage was solemnised, and so in this case the elegit issued, under which *Pitcher* claims, and by virtue of which the plaintiff paid the rent, as she was, bound to do. But then appears the conveyance to *Mrs. Baker*, by which the operation of the elegit was superseded, like the former marriage in the case cited, by which the latter marriage was avoided. The payment of rent, therefore, as in that case, must be considered as having been made by mistake; it only raises a presumption that the party might have distrained for rent; which presumption is open to be disproved. The case of *Sullivan v. Stradling* has, I think, been pressed into the service of the present case, without being quite applicable. It is now settled that a tenant cannot plead *nil habuit in tenementis*; but the meaning of that is, that while he holds possession he cannot plead that the person of whom he holds had no right to demise to him. But it is a very different question, whether a demise to another person cannot be considered as rebutting the title, under which the landlord claims rent,

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(a) 1 *B.* and *P.* 326.

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Mr. Justice CHAMBRE.—Two questions were made in this case at the trial: one, as to the payment of rent, was reserved for the court. In all cases, payment of rent is *prima facie* evidence of the landlord's title; and the reason is, that it would be highly inconvenient that the tenant, by resisting the further payment of rent, should on every occasion be enabled to bring his landlord's title into question; such a practice would be productive of great insecurity, and therefore the evidence should be strong to rebut such payment. A variety of cases might, however, be put, in which a tenant would be excused for paying rent to a person not really entitled to it; and in the present case, there is a very good reason for making an exception to the general rule. *Pitcher* had obtained judgment and execution on an elegit against the plaintiff's landlord, which was quite enough to deceive the person actually in possession; and to be sure, on discovering the truth, she is entitled to shew that the rent was paid under a mistake. The other question was, as to the validity of the conveyance to Mrs. *Baker*, which was a question for the jury to decide, and which they have decided.

Mr. Justice DALLAS.—I am of the same opinion. The general rule is quite clear, that the tenant cannot dispute his landlord's title; and the reason is obvious, and according to reason and common sense. But that goes on the ground that, by his taking, he admits the title of his landlord. But here the plaintiff did not take originally from *Pitcher*, and the jury have found that *Pitcher* had not a good title. The question, therefore, is, whether payment of rent under a misrepresentation estops the plaintiff from resisting any further payment, after the discovery of the mistake. I think that such payment, though it did raise *prima facie* evidence, yet was open to be rebutted by other evidence.

Rule discharged.

1815.

WYNN V. SMYTHIES.

Monday, May 8.

THIS action was brought on stat. 43 Geo. 3, c. 84 (a), for penalties alleged to have been incurred between the 1st of *January* 1812, and the 1st of *October* 1813, and was tried before Mr. Baron *Wood*, at the last assizes for the county of *Essex*; when it appeared, by the admissions of both sides, that the defendant was rector of *Little Bentley*, in the county of *Essex*, and also of *St. Martin*, in the town of *Colchester*;—that between the 1st of *January* 1812, and the 31st of *December* following, he resided in a house of his own, in the parish of *St. Martin*, (there being no parsonage-house in that parish) except for four months at different times, during which he was resident in the rectory-house of *Little Bentley*; and so between the 1st of *January* 1813, and the 1st of *October* following. It was contended, that the defendant was not entitled to reside in the parish of *St. Martin* out of a parsonage-house, although no parsonage-house existed there, without a licence from the bishop, in pursuance of the 19th section of the act; but that, at all events, such a residence did not excuse him from residing at *Little Bentley*, where there was a house of residence. The learned judge, however, was of opinion that each residence, *per se*, was good; and accordingly directed a nonsuit.

The incumbent of two livings, one of which has a house of residence upon it, and the other not, may reside on that in which there is no parsonage-house, without a licence from the bishop; and such residence will excuse him from residing on the other living.

Mr. Serjt. *Copley*, on a former day, obtained a rule *nisi* to set aside this nonsuit, on the latter ground; the Chief Justice observing, with regard to the former, that the gross absurdity of such an objection was too manifest to allow of any hesitation:—A man was to be required to

(a) *Vid. ante*, p. 368. note (a).

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have a licence to reside out of a house which did not exist, and which he could not be called upon to build.

Mr. Serjt. *Best* was now to have shewn cause, but the court called on

Mr. Serjt. *Copley* in support of the rule.—He contended, that the defendant's residence at St. *Martin's* was only an *excuse* for residence there; because, as there was no parsonage-house there, it could not be considered as a regular residence, and therefore did not excuse the defendant from residing at *Little Bentley*, where there was a parsonage-house. It did not follow, that because he could not reside on one benefice, he should not live on his other. In *Law v. Ibbetson* (a), the defendant was rector of *Bushey*, to which there was a parsonage-house, but resided in a house belonging to himself, which was in the parish of *Bushey*, and also within the limits of the archdeaconry of St. *Albans*, which the defendant held with the rectory of *Bushey*, and to which there was no archidiaconal house. The court held unanimously, that the not having it in his power to reside on the archdeaconry, where there was no house of residence, was no excuse for not residing on his parsonage where there was a house; and that then he must reside in that house, and not in any other, though in the same parish. This case, he said, was exactly in point, and went on the distinction between actual residence and an excuse for residence. In *Wilkinson v. Allott*, cited as a note to *Law v. Ibbetson*, where there was no parsonage-house, and the incumbent did not reside in the parish, the court held that though impossibilities would *excuse*, yet he must come as near as he could to residing in the parsonage-house, and must reside somewhere within the parish. [Lord C. J. *Gibbs*.—

(a) 5 Bur. 2722.

That case cannot be reconciled with that of *Law v. Ibbetson*.] Mr. Serjt. Copley said, he only cited it to shew that it was considered, not as a residence, but merely as an *excuse*; and that if he had had another benefice with a house on it, he would have been bound to reside upon that.

Lord Chief Justice GIBBS.—If we look at the justice of this case, as far as that term is applicable to such a case, where we have only to do justice to the parishioners, who fall under the care of the incumbent, the plaintiff's doctrine is exactly contrary to it; for the consequence of it would be, that where a man has one living with a house of residence upon it, and another without, he could never live at all on that living on which there was no house, or at least, not for more than three months, and the parishioners would consequently be without a clergyman. That never could have been the intention of the legislature, which was to provide for as equal a distribution of residence as possible. If there be a house of residence within the dignity, the incumbent is bound to live in it; but if there be none, and he reside within the living, that is the only possible residence that the circumstances can admit of. It is insisted, however, that this is only an *excuse* for residence; but the same reason that excuses him for living on a benefice where there is no house, will also excuse him from residing on any other living, viz. that he is performing his ecclesiastical duties there; and I therefore cannot think that a man is not to be protected by a residence on one living from residing on another, though there be no house on the former.

The rest of the court were unanimously of opinion with the Chief Justice, and the rule was accordingly

Discharged (a).

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(a) See *Wright v. Flamank*, *supra*, 368.

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Monday, May 8.

FLETCHER v. WELLS.

A motion to set aside proceedings for irregularity should be made as soon as the plaintiff, by taking a new step in the cause, shews that he means to proceed;—therefore, when a defendant has been served with notice of declaration, and, interlocutory judgment having been signed, with notice of executing a writ of inquiry, he is too late to take advantage of a defect in the process.

Mr. Serjt. *Blosset* shewed cause against a rule, obtained by Mr. Serjt. *Best*, to set aside the proceedings in this cause for irregularity in the process, the year in the notice, at the foot of the process, being in figures. Independently of the question of law as to the irregularity (a), he contended that the defendant was too late in his application.—It appeared that the writ had been sued out on the 19th of *December* last, returnable the first return of *Hilary* term; that on the 13th of *April*, the defendant was served with a notice of declaration, which was filed accordingly; that interlocutory judgment was signed on the 18th of *April*, and that on the 29th of *April*, the defendant was served with a notice of executing a writ of inquiry. The present motion was made on the 5th of *May*.

Mr. Serjt. *Best*, being called upon to support his rule, contended that this application might be made at any time, before the defendant had taken a new step in the cause; and cited *Dand v. Barnes* (b), where an application of the same kind as the present was made on the 26th of *November*, the last day of *Michaelmas* term, the writ having been sued out on the 29th of *June*, returnable on the 3d of *November*, and the court held that the application was in time.

Lord Chief Justice GIBBS.—After the defendant was

(a) The court, on a former occasion in this term, had expressed their intention to confer with the judges of the *King's Bench*, on the question of this irregularity, which in *Rogan v. Lee*, ante 272, they had decided was fatal, on the authority of a case in that court, and accordingly several cases, in which this application had been made, stood over. In the following term, the Chief Justice delivered the opinion of the court, that it was not necessary to set out the year at full length. *Vid. postea*, p. 577.

(b) *Ante*, 403.

served with this defective process, he was not bound to take notice of it, till he learnt that the plaintiff meant to act upon it; for till then, he had a right to conclude that the plaintiff had discovered his error, and did not mean to pursue it. But when he found, by receiving a notice of declaration, that the plaintiff did mean to proceed, he should have made his application immediately; whereas he waited till he had received notice of executing the writ of inquiry. The rule in the *King's Bench* is, to refuse these motions, even though no new step has been taken, unless the defendant make his application within reasonable time; this court, however, will not bind the defendant to any particular time, nor refuse the application, unless the party who has served the defective process take some step, by which he shews that he means to proceed upon it; in which case, they expect the application to be made immediately (a).—In *Dand v. Barnes*, no new step had been taken by the plaintiff.—*Per Curiam*,

Rule discharged
with costs.

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(a) So in *Downes v. Witherington*, 2 Taun. 243.

C A S E S

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

IN

TRINITY TERM,

IN THE

FIFTY-FIFTH YEAR OF THE REIGN OF GEORGE III

1815.

Saturday,
May 27.

GEORGE ELLIS, plaintiff, and BENJAMIN JOHNSON and wife, deforciant.

MR. Serjt. *Best* moved that the writ of covenant upon this fine might be allowed to pass through the proper offices, upon the copy of the Chief Justice's copy of the præcipe and concord, the original thereof having been lost; and that the chirographer might be directed to make out or ingross the indentures of the fine.—The affidavit was by the cognizee of the fine, and stated that he knew the cognizors named therein;—that the fine was acknowledged by them before the Lord Chief Justice on the 29th of *June* last;—that the writ of covenant relating to the said fine was compounded in *July* last, and the fine and fees paid thereon, and was afterwards passed at the return office; but that the præcipe and concord were lost or mislaid;—that the deforciant were both living;—that the premises contained in the fine were the estate of the deforciant *Benjamin Johnson*, and that the reason of levying the fine was to bar his wife's dower;—and that the parchment writing annexed to the affidavit was a true copy of the copy of the præcipe and concord acknowledged, and in the custody of his lordship's clerk.

Fine allowed to pass, by a copy of the copy of the præcipe and concord left with the judge;—the original having been lost.

The court, after observing that this application proved the importance of the practice, that the copy of the proceedings left with the judge should be signed by the parties;—since that gave a further security to the court,—

Complied with this application.

1815.

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 Saturday,
 May 27.

FONSICK v. MAGNAY, esq. and another.

In an action against the sheriff for not arresting, it is not sufficient evidence to connect the sheriff with his officer, that the officer's name appears on the writ, and that the writ has been returned *non est inventus*;—the sheriff having gone out of office before the return.

THIS was an action against the late sheriff of *Middlesex*, for not arresting a person against whom the plaintiff had sued out a writ on the 18th of *July*, 1814, for the sum of £17, returnable the first return of *Michaelmas* term following. The cause was tried before Lord Chief Justice *Gibbs* at *Guildhall*, at the sittings after last *Easter* term, when an objection was taken by Mr. Serjt. *Best*, that there was not sufficient evidence to connect the defendants with their officer.—It appeared that the defendants went out of office at *Michaelmas*, 1814; and that the writ was returned *non est inventus* on the 6th of *November*:—It was contended, *first*, that the allegation, that the defendants were sheriff till the return of the writ, was negatived: The *Chief Justice*, however, considered that this was immaterial, provided they were in office at the time of the neglect.—It was then objected that the name of the officer, *Owen*, upon the writ, was no evidence against the defendants; and so his lordship was of opinion, especially as they were out of office at the time of the return.—Next it was objected that the return, having been made when the defendants were out of office, was no proof that they had ever issued a warrant to *Owen*, and did not fix on them any privity with him:—The *Chief Justice* concurred in that objection also; but considered that, if the plaintiff could shew by any other means that the defendants were parties to the return, that would remove the objection. It was then attempted to give parol evidence of the warrant, on the ground that *Owen* had gone to reside at *Plymouth*; his lordship, however, thought that such evidence could not be received, and the plaintiff was nonsuited.

Mr. Serjt. *Vaughan* now moved that this nonsuit should be set aside, and a new trial granted. He contended that the name of *Owen* having been inserted, it was to be assumed that the defendants had adopted it; even though it had been introduced, and the writ returned, in their absence from office.

Lord Chief Justice GIBBS.—The demand in this action being so small, the court would not grant a new trial, unless the plaintiff were strictly entitled of right to demand it. That is the general rule; but I do not think that in this case, any thing was left untouched by my brother *Vaughan* at the trial. I am clearly of opinion that the return of *non est inventus* is no evidence that any warrant had been issued by the defendants to *Owen*; nor that his name was indorsed on the writ by them. The regular way to connect the sheriff with his officer is by the production of the warrant; and though they may be connected by other evidence, such evidence must be very clear. My brother *Vaughan* contends that this connection is established by the return of *Owen* himself of what he did under the writ, which, being received by the sheriff, is an acknowledgment by him of what has been done. I agree that, if it had been proved, that the defendants, as sheriff, had received the return, it would have been sufficient to shew that *Owen* was their officer:—But there was no such proof; for the defendants went out of office in *September*, and the return was not till the 6th of *November*, which was therefore no recognition by the defendants.

The rest of the court concurred.

Rule refused.

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FONSICK
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1815.

Tuesday,
May 30.

TASKER and others, v. SCOTT.

A., the captain of a ship, having incurred expences on her account, draws a bill on his owner in payment, with a memorandum, 'that if it should not be honoured, the holder would insure the amount, and place the premium, &c. to the ship's and *A.*'s account.'

The bill is indorsed to *B.*, and by him presented for acceptance, but dishonoured; and *B.* then effects an insurance, the interest being declared to be on the bill.—

In an action by *B.* against *A.* for the premium and expences;—*Held*, 1st, that *B.* was justified in effecting the insurance as for time, instead of on the voyage;—and, 2ndly, that, whether the insurance were void, or not, as between the insured and the underwriters, *B.* was at all events entitled to recover the expences incurred by him.

THIS was an action on the money counts, and, as appeared by the particular of the plaintiff's demand, was brought to recover the sum of £241 : 15s. 3d., 'for the costs and charges of effecting an insurance on interest by the ship *Ocean*, in *August* last, at the instance and request of the defendant.' The defendant was captain of the ship, which had been employed in the *American* trade, and having incurred certain expences on her account in *Canada*, drew a bill for the amount on his owner, *Mr. Bousfield*, in *London*, dated *Quebec*, the 10th of *June*, 1814; payable to *Mr. J. Goudie*, with this memorandum at the foot of it:—'If the above is not duly honoured, the holder will insure the amount, and place the premium, &c. to the ship's and my account. *James Scott.*' This bill was indorsed and transmitted by *Goudie* to the plaintiffs in this country, and by them presented for acceptance, but dishonoured; and accordingly, the plaintiffs effected the insurance on the 12th of *August*, 1814, for the space of three months.—The interest was declared to be 'on a bill of exchange drawn by *J. Scott* on *M. Bousfield*, *Lombard-Street*, in favour of *John Goudie*, for value received for the use of the ship.'—The ship was lost on the 22nd of *November*, 1814.—The cause was tried at the sittings after last *Easter* term, at *Guildhall*, before Lord C. J. *Gibbs*, when the *Solicitor General*, on the part of the defendant, made two objections; first, that this was an illegal insurance, and not available against the underwriters; being an insurance without interest, and prohibited by stat. 19 *Geo. 2. c. 37*;—and therefore, that the premium could not be recovered back. The Chief Justice, however, thought otherwise; his lordship observed, that there were many cases where the po-

licy would be void, and yet the premiums might be recovered back ; and that, if the insurance were really effected by order of the person having an interest in the subject of it, there was no doubt but the expences incurred might be recovered.—*Secondly*, it was objected, that the insurance should have been on the ship, and not on the bill ; and on the voyage, instead of for three months ; because the owners would have had no benefit from the insurance, in the form in which it was effected :—To which his lordship answered, that it was not intended to be for the benefit of the owners, but of the person advancing the money ; that the insurance was for time, and in his lordship's opinion, judiciously so ; because, by confining it to that extent, the plaintiffs lessened the burthen of the premium.—The jury found a verdict for the plaintiffs.

The *Solicitor-General* now moved that this verdict should be set aside, and a new trial granted, on the points above stated. As to the *first*, he contended that this was clearly a wager policy, within the principle of *Kulen v. Vigne (a)*, and that where the contract under which a person lays out money is illegal *within his knowledge*, whether by statute or otherwise, he cannot recover the expences incurred in carrying it into execution. As to the *second* point, he insisted that, though the holder of the bill was left to his discretion as to the extent of the insurance, still it was his duty to effect it for the voyage, so that the owners might have had the full benefit of that insurance, supposing it to be available at all, when the ship was lost.

Lord Chief Justice GIBBS.—I cannot say that, on further consideration, I think there is any weight in either of these objections. As to the insurance being for time,

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and not on the whole voyage, there was no particular insurance prescribed, but it was left to the discretion of the holders of the bill, and if they have exercised that discretion honestly, I see nothing to control it. With respect to the illegality of the insurance, as to which I desire that my opinion may be considered as confined to this particular case, the insured had this interest in the arrival of the ship, that by such arrival, his debtors would have more ample means of paying the amount of the bill. It was on the authority given by the bill, and by the direction of the captain, that the insurance was effected; and the plaintiffs having previously advanced this money for the use of the captain, I think they are entitled to recover it back. In many cases, this would be an available security, indeed in all cases but that of *British* vessels, and I see no necessity for inquiring whether this were a *British* ship or not.

The rest of the court concurred.

Rule refused.

Wednesday,
 May 31.

ANTOINE v. MORSMEAD.

Two *British* subjects, *A.* and *B.*, being detained prisoners in *France*, *A.* draws bills payable to *B.* on another *British* subject resident in *England*, which *B.* indorses to *C.*, an alien enemy:—*Held*, that, on the return of peace, *C.* is entitled to recover the amount of the bills from the acceptor.

THIS action was brought to recover the amount of five bills of exchange, which had been drawn, accepted, and indorsed, under the following circumstances.—Sir *Jas Morshead*, the father of the defendant, being detained as a prisoner in *France* at the recommencement of hostilities after the peace of *Amiens*, was sent with many others to *Verdun*, where he resided a considerable time; and drew the bills in question, being all of the same date, 12th of *September* 1806, and payable at twelve months after date, on his son in *England*; four of which were payable to a Colonel *Tyndall*, and one to a Mr. *Estwick*, who were also

detenus at Verdun; the bills were all transmitted to *London*, and accepted by the defendant, and shortly after indorsed to the plaintiff. The action was commenced after the late peace was concluded with *France*. The cause was tried at *Westminster*, at the sittings after last *Easter* term, before Lord Chief Justice *Gibbs*, when it appeared that the bill which was drawn in favour of *Estwick* had been given to secure a gaming debt; and the Chief Justice held that, though it was drawn in *France*, yet as it was payable in this country, it was illegal within stat. 9 *Ann*, c. 14. (a). His lordship, however, observed, that there was no evidence of illegality to affect the four bills which were drawn payable to *Tyndall*, and the plaintiff accordingly had a verdict for the amount of them.

Mr. Serjt. *Vaughan* had moved yesterday for a rule to shew cause, why this verdict should not be set aside, and a new trial granted, on the ground that the plaintiff was an alien enemy at the time when the transactions took place; and that, as such, he was incapable of entering into any contract with a subject of this country, without a licence from the crown. [Lord C. J. *Gibbs*.—You must contend, either that the bills were void in their original creation, as between the drawer and acceptor, or else that it was illegal to indorse them to an alien enemy.] He contended, that it was illegal to indorse them by stat. 34 *Geo*. 3, c. 9. (b). It being suggested that this statute

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(a) *Vid. ante*, 497. (a).

(b) The 4th section of that act, which was passed for the purpose of preventing the property of *British* subjects, resident in *France*, being applied to the use of that government, and for preserving it for the owners thereof, enacts 'That if any person residing in *Great Britain* shall, during the war, knowingly accept, or indorse, or undertake for the payment of any bill of exchange, &c., drawn, indorsed, or negotiated by, or on account, or for the use, or on the credit of the persons exercising the government of *France*, or of any person, who on or since the 1st of *January*, 1794, was, or at the time of the act done shall be, residing in any of the

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enemy would be void, because it would be impolitic to indemnify the enemy against the risk incurred in their commercial adventures. The *second* principle is, that however valid a contract, as originally entered into, may be, yet if in the progress of events, the person with whom a subject of this country contracts become an alien enemy, he cannot sue on that contract. The crown might sue during the war, as for a debt due to an alien enemy; but the latter cannot recover until peace is established. The only question, then, is, whether the present case range itself within either of these principles. The second of them may be laid out of the question, because the plaintiff was not an alien enemy at the time when the action was brought. Lastly, then, did the plaintiff derive a valid title to these bills? The parties could not have existed without these means of raising money; and if this doctrine were to be carried to the extent which is contended for, many of our countrymen must have perished in *France*. Without, therefore, laying down any general rules on this subject, I think that these bills, having been drawn for a legal purpose, were valid.

Mr. Justice CHAMBRE (a).—I am of the same opinion. It would be monstrous to carry this doctrine to the extent which is contended for. In the cases which have been cited, there was the policy of the state, which induced the necessity of preventing an intercourse with an enemy's country; but there was no such necessity in the present case.

Mr. Justice DALLAS.—This was not a contract between a subject of this country and an alien enemy, nor was it one to which the reason of the rule applies. The ground of that rule is, that no communication shall be kept up

(a) Mr. Justice Heath was absent from indisposition, which prevented him from attending the court, till *Wednesday*, the 7th of June.

with a country in a state of war, without a license from the crown for that purpose; now this cannot be considered as such a communication, for both the parties were residing in *France*; the general rule, therefore, does not apply.

Rule refused.

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TREMAIN, and another, v. FAITH.

Wednesday,
May 31.

Mr. Serjt. *Vaughan*, in last term, moved that it might be referred to the prothonotary, to review his taxation of the plaintiff's costs, so far as related to the sum of £150, allowed for the expences of a witness, who had been brought from abroad. By referring to the case of *Tremain v. Barrett*, ante 463, it will be recollected that the proceedings in this action were stayed, pending that of *Tremain v. Barrett*; and that the plaintiffs having recovered in that action, by means of a witness who was brought over for the support of the present suit, the court considered that they were only entitled to the costs of his *detention* in this country for a reasonable time, and not for those of bringing him over, or of sending him back. The plaintiffs afterwards proceeded to tax their costs in the present action, when the prothonotary considered that, as the witness had been *sent for*, expressly for the purpose of giving evidence in this action, the plaintiffs were entitled to the reasonable expences of bringing him over and sending him back, though he arrived here before the action was commenced; and accordingly allowed the sum of £150 for the same.—Mr. Serjt. *Vaughan* contended that no costs ought to be allowed in any case, where the witness was brought over prospectively, before the action was commenced; and he relied on *Schimmel v. Lou-*

Where a witness is sent for from abroad, *bond fide* for the purpose of the cause, and for no other; it is in the discretion of the prothonotary to allow the plaintiff the costs of bringing him over and of sending him back, though he should have been sent for, and have arrived, before the commencement of the action.

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sada (a), which, he said, was decided on the ground, that the court of *King's Bench* had adopted the rule strictly.

Lord Chief Justice GIBBS.—If there be a strict and rigid rule, that a plaintiff shall never be allowed the expence of bringing over a witness before action brought, nor, consequently, those of sending him back, the prothonotary ought to review his taxation in the present case, because the witness arrived before the action was commenced. The decision in *Schimmel v. Lousada* was founded on the supposition, that the *King's Bench* had laid down the rule as fixed and invariable; though the circumstances of that case would have justified the decision, even if it had been discretionary. I cannot, however, think that there is any such rigid rule in the *King's Bench*; and the master of that court has stated that, under circumstances like the present, he should allow the reasonable expences of the passage hither and back (b). If then the rule be not invariable, the question is, whether it should be applied to the present case. I think there should be a rule to shew cause, because the case of *Schimmel v. Lousada* stands reported, and contains a principle which runs counter to the decision which we are at present inclined to come to; and therefore, that further inquiry should be made into the practice of the *King's Bench*.

On this day his lordship said:—We have communicated with the *King's Bench* on the subject, and it appears that the report made to this court in the case of *Schimmel v. Lousada* was not quite correctly conceived. It was supposed there, that if the witness were sent for before the commencement of the action, that was a decided reason for not allowing the costs of bringing him over. That,

(a) 4 Taun. 695.—(b) *Ante*, 465.

however, is not exactly the rule. It is to be in the discretion of the officer, whether the witness were *bond fide* sent for, for the purpose of the present cause, and not for any other purpose, or for any other action; and then, though he should have been sent for, and have arrived, a little before the writ was sued out, the plaintiff would still be allowed the costs of his passage hither and back. This is the principle on which the *King's Bench* has uniformly acted, and in the present case, the prothonotary has acted on the same principle. It is very desirable that the practice of the two courts should coincide, and as the principle on which the *King's Bench* has acted is very satisfactory, we shall adopt it.—*Per Curiam*,

Rule discharged.

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TREMAIN
v.
FAITH.

JOHNSON v. LEIGH, esq. and another.

Thursday,
June 1.

THIS was an action of trespass for breaking and entering the plaintiff's dwelling-house, and making a noise and disturbance therein for the space of four hours, and breaking open and damaging the locks, doors, and hinges; to which the defendants pleaded a justification; as sheriff of *Middlesex*, under a writ of *alias testatum capias* against one *Thomas Johnson*; by virtue of which, the defendants, as such sheriff, peaceably entered into the said messuage, the outer door being open, and there being reasonable and sufficient ground to suspect that house being fastened, and having reasonable suspicion that *A. B.* was therein, the defendant broke open the same;—without averring that *A. B.* was actually in the house, or that there was any previous demand of admittance;—the sheriff being justified, or not, in entering the house of a *stranger*, by the event.

In a plea of justification by the sheriff to an action for breaking the plaintiff's house, and breaking open the inner doors, it is not sufficient to allege that he entered under a *capias* against one *A. B.*, the outer door being open; and that the rooms in the

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the said *T. Johnson* then was therein, in order to arrest him; and did necessarily make a little noise, &c., and continued therein for the time mentioned in the declaration; and that the entrance of four rooms in the said house, being fastened by the said doors, &c., and there being reasonable ground to suspect that the said *T. Johnson* was in the said rooms, or one of them, the defendants necessarily broke and entered the same.—To this plea the plaintiff demurred, assigning for causes that, though the defendants had professed and attempted to justify the breaking open and damaging the doors, &c., yet that they had not shewn any sufficient justification for the same;—and also, that they had not shewn that they demanded or required of any person in the said house to open the doors of the said rooms, or that they demanded the key thereof;—or that no person was in the house, of whom to demand the same.—The defendants joined in demurrer, and

Mr. Serjt. *Pell* was now to have argued in support of it, but the court called on

Mr. Serjt. *Blisset* in support of the plea. He said there was a distinction between outer and inner doors; and cited *Hutcheson v. Birch* (a), where it was held that the sheriff, having entered the outer door of the house, which was open, was justified in breaking open the inner doors, without any previous demand, to search for goods which were in the house. In 5 *Coke* 93, 5th resolution, a distinction was taken between the house of the person against whom, or against whose goods, the execution was issued, and the house of a stranger;—there being many cases where the sheriff may break open the house of the latter, but not that of the former (b). He also cited *Rat-*

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(a) 4 *Town.* 619.—(b) But that is after denial on request made; and it is added, at the end of that resolution, that before

*cliffe v. Burton* (a), where Lord *Alvanley* incidentally stated his opinion to be, that a sheriff's officer might justify entering the house of a person against whom he had civil process, in order to ascertain whether he were there or not. [Lord C. J. *Gibbs*.—That was only a loose observation of Lord *Alvanley*'s.—In *Hutchison v. Birch*, the goods were actually in the house; here, there was no averment that *Johnson*, (against whom the *capias* had issued), was in the house; only that there was reasonable suspicion;—the cases, therefore, are not similar. I have always taken the distinction to be that, in entering the house of a *stranger*, the sheriff is justified, or not, by the event (b).] The court then proposed to Mr. Serjt. *Blosset* to amend; observing that he must not proceed in his argument, and then, if he did not succeed, move to amend:—The learned serjeant, accordingly, declined proceeding in his argument, and had

Leave to amend, on payment of costs.

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the sheriff, in such case, breaks the house, he ought to demand the goods to be delivered to him; for the words of the statute (*West. 1, c. 17*), are;—"After that the cattle shall be solemnly demanded by the sheriffs, &c."

(a) 3 *B. & P.* 223.—(b) So in his lordship's judgment in *Coak v. Birt*, ante 339.

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BROWN v. CRUMP.

Thursday,  
June 1.

THIS was an action of *assumpsit*, and the first count of the declaration stated that, whereas the defendant, on the 24th of *November*, 1808, at his special instance and the plaintiff of a farm, the defendant undertook to make a certain quantity of fallow, and to spend 60*l.* worth of manure every year thereon, and to keep the buildings in repair:—*Held* bad on general demurrer; those obligations not arising out of the bare relation of landlord and tenant.

A declaration that in consideration that the defendant had become tenant to

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 CRUMP.

request, *had* become and was tenant to the plaintiff of a certain farm and premises; in consideration thereof, the defendant then and there undertook and faithfully promised the plaintiff to make not less than 30 acres of fallow on the said farm yearly, during the said tenancy, and to spend £60 worth of manure every year upon the farm, and to keep the buildings thereon in repair, being allowed timber in the rough; that the defendant was and continued tenant to the plaintiff till the 29th of *September*, 1814:—Yet that he did not, nor would, during the continuance of the said tenancy, make 30 acres of fallow on the said farm in each year, nor spend £60 worth of manure every year upon the said farm, nor keep the buildings in repair, though the plaintiff was ready and willing to allow him timber in the rough for that purpose.—To this count the defendant demurred generally, the plaintiff joined in demurrer, and the case now came on for argument.

Mr. Serjt. *Best* observed, that the ground of the demurrer was, that there was not a sufficient consideration for the defendant's undertaking, as stated in the declaration;—that it was incumbent on the plaintiff to shew that the defendant became tenant to her on the terms specified in the alleged promise, or some special custom of the country to comply with such terms (*a*). The declaration was framed on the supposed application of *Powley v. Walker* (*b*), where it was held that the mere relation of landlord and tenant was a sufficient consideration for the tenant's undertaking to cultivate the farm in a good and husband-like manner, according to the custom of the country;—none of the obligations, however, alleged in the present case, not even to spend manure, of

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(a) See *Leigh v. Hewitt*, 4 *East*, 154.—(b) 5 *T. R.* 373.

a *fixed value*, arose out of the bare relation of landlord and tenant. He cited *Gibson v. Wells* (a), where this court held that an action on the case would not lie for permissive waste, *i. e.* the omission to repair by a tenant at will; this declaration was in direct opposition to that decision, as far as related to the alleged undertaking to repair, for it did not appear that the defendant here was more than tenant at will. The case would have been different if the plaintiff had declared upon an executory consideration, as in consideration that the plaintiff *would* become tenant, &c.

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Mr. Serjt. *Copley*, *contra*, mentioned the case of *Stewart v. Wilkins* (b), where an objection was taken to the usual mode of declaring on the warranty of a horse;—that the defendant promised that the horse *was* sound;—but was overruled. [Lord C. J. *Gibbs*.—The objection there was, that all promises should be executory, but the court, and particularly Mr. *J. Buller*, held that they were not necessarily so. The doctrine which I have often heard Mr. *J. Buller* lay down is, that every tenant, where there is no particular agreement dispensing with that engagement, is bound to cultivate his farm in a husband-like manner, and to consume the produce on it; this is an engagement which arises out of the letting, and which the tenant cannot dispense with, unless by special agreement; but it does not follow that a tenant shall be bound to have a certain portion of land every year in a certain tillage.] Mr. Serjt. *Copley*, after this intimation, declined to argue the question, but had

Leave to amend, on payment of costs.

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(a) 1 *New Rep.* 290.—(b) *Doug.* 18.



1815.

Thursday,  
June 1.

MOIR v. The corporation of the ROYAL EXCHANGE  
ASSURANCE.

A ship was insured at and from *Memel* to *England*; warranted to depart on or before the 15th of *September*: Having taken in her cargo in the port of *Memel*, she got under weigh, with the intention of proceeding on her voyage, on the 9th of *September*, with a prospect of favourable weather; but was obliged, by contrary winds, to come to an anchor near the mouth of the harbour, where she was detained till after the 15th. —*Held*, that though this would have been a compliance with a warranty to sail by such a day, this warranty being to depart, which could only mean from the port of *Memel*, had not been complied with.

THIS was an action of debt upon a policy of insurance, dated the 19th of *September* 1811, for £1500, upon the ship *Neptunus*, at and from *Memel* to her port of discharge in *England*, free of capture and seizure, and the consequences of any attempt thereof, in the port and roads of lading, and warranted to depart on or before the 15th of *September*, at a premium of 25 guineas per cent., with different returns of premium. The declaration averred that the ship, on the 9th of *September* 1811, and before the 15th of *September*, departed for and towards *England* upon the said voyage; and that afterwards, and while she was proceeding on the said voyage, she was lost by perils of the seas. The cause was tried before Lord Chief Justice *Gibbs*, at the sittings after last *Hilary* term, when a verdict was found for the plaintiff, subject to the opinion of the court on a case, which stated the subscription to the policy, the interest of the insured, and that the ship, in *August* 1811, took in a cargo at the port of *Memel*, with intention to proceed therewith to a port in *England*; that on the 31st of *August*, her loading was completed; that between that day and the 9th of *September* following, she was cleared out at the custom-house at *Memel*, ready to proceed on her voyage: That on the first opportunity afterwards, which was on the 9th of *September*, there being some little prospect of favourable weather, she hove up her anchor, broke ground from her station where she had loaded, and got under weigh with the intention of proceeding to *England*; but before she had been half an hour under weigh, the sea breeze came in strong from the westward, and obliged her to come to

an anchor as near the sea (at the *Haff*, or river-mouth) as was consistent with her safety. That she lay there in perfect sea-readiness, with above thirty other ships, until the first opportunity that afterwards presented for sailing, which was on the 21st of *September*, when she, with more than twenty other ships, sailed from the said port on their respective voyages. That no ship or vessel whatever sailed from or left the port of *Memel*, between the 26th of *August* and the 21st of *September*. That the part of the *Haff*, or situation, where the ship *Neptunus* took in her cargo, is not above a *British* statute mile from the sea-mouth, and the place where they lay from the 9th of *September* to the 21st of *September*, is not more than half that distance. That there is a bar at the sea-mouth, about two miles from the town of *Memel*, which is the limit of the port of *Memel*. That the *Neptunus*, in the prosecution of her said voyage, arrived at *Hanc* on the 25th of *September*, and there joined convoy, and sailed from thence on the 4th of *October*, with the said convoy for *England*; and in the course of her voyage was totally lost by perils of the sea.—The question for the opinion of the court was, whether the plaintiff was entitled to recover. It was agreed that this case might be turned into a special verdict, at the desire of either party.—The case came on for argument on this day, when

Mr. Serjt. *Marshall*, for the plaintiff, observed that the question was, whether, or not, the ship had departed on her voyage within the meaning of the warranty. He admitted, that there must be a strict compliance with every warranty; but contended that it must be understood in the commercial sense of it. The meaning of the present warranty was, that the ship, on or before the day prescribed, should have all her cargo and clearances on board; and being in complete sea-readiness, should heave her anchor and get under weigh upon the voyage insured :—Having done

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this *bond fide*, the warranty would be complied with, though she should be obliged to put back, or come to an anchor immediately, and should then be detained after the stipulated day. It was admitted by the defendants, that if the warranty had been to *sail* at such a time, there would have been a compliance with it; but it was to be contended, that there was a distinction between *sailing* and *departing*; that the latter expression meant fairly getting out of port; and that, he admitted, was the view which Lord *Ellenborough* entertained of it (*a*). With every possible deference, however, to that great authority, he contended, that a ship could neither be said to sail from a place without departing from it, nor depart without sailing. The words *sail* and *depart* were convertible terms, and the distinction was merely fanciful. [Lord C. J. *Gibbs*.—It is necessary to add something to the word *depart*, which is a relative term, and must be taken to mean a departure *from some place*.] Sailing was equally relative, and implied a sailing from some place. But admitting this distinction, still, he contended, the warranty had been complied with. The ship was insured at and from *Memel*, not from *the port of Memel*; it was not necessary, therefore, that the ship should depart from the port of *Memel*; a departure *from Memel* was sufficient, and the moment she had got under weigh, with the intention of proceeding for *England*, which the case had found she had done, she had departed from *Memel*. Suppose the ship had been insured *from Memel*, (not *at and from Memel*); the moment she had got under weigh, and began to move from *Memel*, the policy would have attached, and the underwriters would have been liable, though she had

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(*a*) An action on this policy was first brought in the *King's Bench*, and was tried before Lord *Ellenborough*, at the sittings after last *Michaelmas* term, when his lordship held that the warranty had not been complied with.

been lost before she got to the harbour's mouth. So, if a ship insured on a voyage *from London*, (not *at and from London*) should be lost on her way to *Gravesend*, before she had cleared the port of *London*; this, though the ship was still in the port of departure, would be a loss within the policy. The objection was founded on some fanciful limit of the port of *Memel*, of which there was no evidence. Nothing, however, could be more vague or undefined than the term *port*, nor could any precise rule be made with reference to it. The port of *Southampton* comprehended *Portsmouth*, *Lymington*, the *Isle of Wight*, *Jersey*, and *Guernsey*; that of *Exeter* reached from the river *Ex* 30 miles eastward along the coast; and *Liverpool* was within the port of *Chester*. In *Constable v. Noble* (a), it was held that a policy on goods from *Lyme* to *London* would not protect goods shipped at *Bridport* for *London*; though *Bridport* was a member of the port of *Lyme*, and nearer to *London*, and the risk consequently less than from *Lyme* to *London*. So in *Payne v. Hutchinson* (b). In *Bond v. Nutt* (c), where the insurance was at and from *Jamaica* to *London*, the court held that the ship having sailed from *St. Anne's*, her port of loading, to *Bluefields* to join convoy, had complied with the warranty to sail; though *Bluefields*, as well as *St. Anne's*, was within the port of *Jamaica*, which was held to extend all round the island. The same point was decided in *Thellusson v. Ferguson* (d). He concluded by observing, that the case of the plaintiff was free from every imputation of fraud; that the objection on the part of the underwriters was one *stricti juris*, and therefore, that the court would give no more weight to it than the law absolutely required.

Mr. Serjt. *Bosanquet*, *contra*, observed, that as the express object of the warranty was to stipulate that the

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(a) 2 Taun. 403.——(b) 2 Taun. 405.——(c) Cowp. 601, Doug. 367. S. C.——(d) Doug. 361, 366, [q].

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ship should never come into a winter risk, the objection would be rather *stricti juris* for the plaintiff to overcome, than for the defendants to substantiate it. Without impeaching the authorities which had been cited, but merely looking at the facts of this case, it would be impossible to contend that the warranty had been complied with. *First*, he contended that, independently of the distinction between *sailing* and *departing*, there was considerable doubt whether the ship had even sailed. In all the cases, he said, there was an apparent probability that the captain would be able to proceed, and the obstruction had always commenced after the ship had got under weigh: Here, on the contrary, the wind was not favourable at the time of her weighing; there was only 'some little prospect of a favourable change,' and the captain had merely put himself in the best situation for availing himself of such change; he had only changed his position in the *port of loading*, and had come to an anchor within the bar. Now it was decided, that if the ship were detained in port, by whatever accident, even by the perils of the sea which were insured against, though she should have all her papers on board, and her sails even filled, still the insured would be liable, because the sailing was a condition precedent.—*Secondly*, he contended that, at all events, the ship had not *departed* on her voyage. The defendants had purposely substituted that word for the more usual expression '*sailed*;' and as far back as the year 1787, it appeared by the case of *Rogers v. The Royal Exchange Assurance Company* (a), that they had had it in contemplation to raise this question. Then what could be the 'meaning of the word '*depart*,' but from the port or place of loading? [Lord C. J. Gibbs.—There is a term in all policies to which it may be referred, for the risk is always from one

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(a) *Sittings in C. P.* after *Mic.* 1787, before Lord Loughborough, cited 2 *Park on Insur.* 442.

place to another; then the warranty to depart is exactly the same as if the risk had commenced from that place.] The present being the first case on the subject before this court, he should avail himself of the decision of the *King's Bench*. When the cause was tried in that court, the documents had not arrived, and the underwriters admitted that the ship had sailed with a favourable wind, which turned out not to have been the case; yet even there, Lord *Ellenborough* said, he was quite clear as to the meaning of the word *depart*; 'that the ship should be clear off 'on her voyage;' and so, when the case came before the court on motion, his lordship asked from whence was the departure to take place, except from the *port of Memel*? If the plaintiff should succeed, parties insured would always take care that the ship should move some little distance, in order that the risk might attach; and innumerable questions would arise as to the probability of success in getting away, which, by deciding in favour of the underwriters, would be put an end to.

Mr. Serjt. *Marshall*, in reply, said that he was not at all removed, by the defendant's argument, from the ground which he had first taken; that there was no distinction between sailing and departing, and that if departure be relative, the warranty to depart must mean from the *terminus a quo*, that is, from *Memel*. So far as she had proceeded towards the mouth of the harbour, so far had she got on her way towards *England*. What then would have been the commencement of the voyage? Not when she had got over the bar, because if a loss had happened before she had got to the mouth, the underwriters would have been liable. The case was reducible to the simple question, from whence was she to depart, and when did she depart?

Lord Chief Justice GIBBS.—If this had been a warranty that the ship should *sail* on or before such a day, I should

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have thought most clearly, 'both on the authority of the cases, and without their authority, that the ship had sailed; because on an insurance at and from *Jamaica*, or any other place, to *London*, a warranty to *sail* means that she shall commence her voyage by such a time; and in the present case, the ship was under weigh, and in the prosecution of her voyage, before the time prescribed. The present policy, however, is worded differently from any that has come under the consideration of any court. The company has adopted a different mode, with a view, as appears from the case of *Rogers v. Royal Exchange Assurance*, to oblige the ship actually to *depart*. The decisions hitherto have been, that when a ship has got under weigh, the warranty is complied with, and I agree with those decisions; but I think that the word *departure* will not bear that construction, but must mean a departure from some particular place, viz. from the port of *Memel*. My brother *Marshall* says, that if this had been an insurance from *Memel* to her port of discharge in *England*, and the ship had been lost before she got to the sea-mouth, the underwriters would have been liable; there is no authority, however, for that position. We must put some meaning on these words; and we can put no other but that of a departure from the port of *Memel*. The limits of the port are expressly mentioned in the case, viz. the bar at the sea-mouth, about two miles from the town of *Memel*, and I cannot see any *terminus a quo* but that. I am, therefore, of opinion, that the warranty has not been complied with.

Mr. Justice CHAMBRE (a).—I perfectly agree with his lordship's opinion; it is the only decision which is consistent with the real intention of the parties. What had they to do with the town of *Memel*? The object was to get rid of the winter risk.

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(a) Mr. Justice Heath was absent.

Mr. Justice DALLAS.—The insurance is at and from *Memel* generally, with a warranty to depart on or before a certain day; nothing is said either about the *town* or *port* of *Memel*. My brother *Marshall* contends, that there is no difference between sailing and departing, and that this warranty, according to the general construction and commercial meaning of it, must be considered as relating to the *town* of *Memel*. As to the *first* point, I am of opinion, that there is a distinction between *sailing* and *departing*, and that it is not a distinction without a difference. *Secondly*, as to what is contended on the commercial construction, there is no authority nor any reason for considering this on so narrow a ground. The reason is rather the other way, and I was much struck by the circumstance of the company introducing this word instead of the usual expression. The insured was bound to consider the distinction, and whether he did not bind himself by it; I am clear that the meaning of the parties was a departure from the *port* of *Memel*.

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Postea for the defendants.

Mr. Serjt. *Marshall* afterwards moved that, according to the agreement of the parties, the case should be turned into a special verdict.

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KENNINGTON v. ANDERSON.

Friday, June 2.

IN this case a motion had been made last term to set aside the proceedings for irregularity, in having the year in the notice at the bottom of the process in *figures*; which in *Rogan v. Lee*, ante 272, was held to be irregular. The court expressed their intention of conferring with the judges of the *King's Bench* on the subject; and this case, with several others, stood over till this term, and

In the notice to appear at the foot of the process, it is not necessary that the year should be stated in words at length.



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Lord Chief Justice GIBBS now delivered the opinion of the court. In *Rogan v. Lee*, following the decision of the court of *King's Bench*, we decided that it was necessary that the year should be in words at length; but we have had a communication with the judges of that court on the subject, and on conferring together we were of opinion that, on the whole, there is not sufficient ground for supporting that decision; and that, as the year is not mentioned at all in the act (a), it is sufficient to set it out in figures.

Rule discharged.

(a) *Ante*, 372, note (a).

Friday, June 2.

JOHN GREY, plaintiff, and JOHN WAINWRIGHT and wife,
 THOMAS WAINWRIGHT and wife, THOMAS COVERDALE
 and SUSANNAH his wife, deforciant.

The præcipe and concord of a fine amended, by inserting the real christian names of the deforciant, instead of those which had been erroneously inserted.

MR. Serjt. *Vaughan* moved to amend the præcipe and concord of this fine, by changing the names of two of the deforciant, 'Joseph' Coverdale and 'Hannab' his wife, to 'Thomas' Coverdale and 'Susannab' his wife, by the deed to lead the uses.

The Chief Justice observed, that unless the court came to some regulation respecting these amendments, their time would be occupied with nothing else; the court was far from wishing to bear hard or animadvert severely on unintentional mistakes; but this sort of carelessness was growing so much into practice, that if it were certain that the parties would not be sufferers by it, the court would refuse this application.—With this animadversion, however, the court

Allowed the amendment.

WOHLENBERG v. LAGEMAN.

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Tuesday, June 6.

MR. Serjt. *Copley* having obtained a rule for an attachment of contempt against *Lageman*, for non-performance of an award,

Mr. Serjt. *Vaughan* now shewed cause against it, on the ground that though the arbitrators, he admitted, had power to enlarge the time for making their award, and had enlarged it, and had stated in their award that they had done so; yet that that fact was not verified by affidavit; nor was there any indorsement of the enlargement on the copy of the submission, or on that of the rule of court, which had been served on *Lageman*. A party, he said, could not be guilty of contempt, without having had notice of the facts which were to bring him into contempt. He cited *Davis v. Vass* (a), where this question came before the consideration of the *King's Bench*, and that court held that the enlargement of the time should be verified by affidavit; and that the person against whom the attachment was moved for, should have notice of such enlargement, when served with the rule for the attachment.

Mr. Serjt. *Copley*, *contra*, though he admitted that the case of *Davis v. Vass* was similar to the present, said it was contrary to the principle which had uniformly prevailed in analogous cases. In ordinary cases, where the time had not been enlarged, all that was necessary was, to swear to the execution of the award, and the court would presume that all things were *rite acta*, unless the contrary were shewn; without stating that the award was made on or before the time originally specified. Being asked by the court, whether there were any case where that had been

Where the time for making an award is enlarged, and the award is made within that time, a party must have regular notice of the enlargement, proved by affidavit, or by indorsement on the copy of the submission, or of the rule of court, before he can be brought into contempt for disobedience to it; and it is not sufficient that the arbitrator states in his award, that he has enlarged the time.

(a) 15 East, 97.

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ther they can be so considered, after they are put up in the house.] Another ground was, that the sums which the defendant had paid might be applied to that part of the demand which was for materials found; since there was no special direction as to the application of it; and then the plaintiff would be clearly entitled to recover for his work and labour. [Lord C. J. Gibbs.—If you cannot recover at all upon the count for goods sold, that payment will not help you.] Still then, he contended, it was sufficient to entitle the plaintiff to recover on the account stated.

Mr. Serjt. *Blisset*, *contra*, contended that, where the contract was *entire*, a party could not apply a payment to any part he chose, any more than a man could divide an entire contract, and recover on different parts of it, on different counts. The contract here was to build a house, and though that consisted in providing materials, laying out money, hiring labourers, &c., still that was all contained in the entire contract, which could not be separated, and which, therefore, should have been stated in one count. The plaintiff might as well have brought two different actions; one for work and labour, and the other for the materials; for different counts were as distinct as several actions. He was not interested in contending that the plaintiff could not recover on the count for work and labour, though he should think that he could not, because that part of his demand must be considered as settled; but he certainly could not recover on the count for goods sold and delivered.

Lord Chief Justice GIBBS.—This is a very captious and technical objection, and does no credit to the defendant; but the court is bound to decide according to the legal effect, and as the special pleader or attorney, who drew this declaration, has omitted to include in the count the

materials found, we must say that the contract proved is not that which is stated in the declaration. It is, as my brother *Blosset* says, one entire contract, though composed of different things. It is unnecessary to say, whether the plaintiff could have recovered for his work and labour, because there has been money paid into court sufficient to cover that part of the demand; but I am of opinion, that he was not entitled to recover the remainder as for goods sold and delivered.

The rest of the court concurred.

Rule absolute.

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BARTLETT v. TUCHIN and another.

Wednesday,  
June 7.

**THIS** action was brought to recover the sum of £1108, being the deposit paid by the plaintiff on the sale of certain premises by the defendants, who were auctioneers; and was tried before Lord Chief Justice *Gibbs*, at the sittings after last *Michaelmas* term, at *Westminster*, when a verdict was found for the plaintiff, subject to the opinion of the court on a case, which, as far as is necessary for the present question, was as follows.

On the 13th of *March* 1813, a commission of bankrupt issued against *M. Price*, who was declared bankrupt, and his property was assigned to assignees under that commission. On the 27th of *July* 1813, the defendants, under the direction and authority of the assignees, put

the same assignees are chosen:—*Held*, that as the assignees, at the time when they received notice from the purchaser, had not a good title to the estate, they could not enforce the contract, nor, consequently, retain the deposit.

A bankrupt's estate is sold by auction; the purchaser, after having paid a deposit, gives notice that he means to abandon the purchase, on a supposed defect in the title; the commission is afterwards superseded, on the ground that there was no good petitioning creditor's debt, and another commission issues, and the same assignees

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part of the bankrupt's freehold and copyhold estates up to auction, and the plaintiff was declared the purchaser of one of the lots, paying £20 *per cent* on the purchase money, by way of deposit. In *Michaelmas* term 1813, the bankrupt brought an action to try the validity of the commission, in which he recovered, on the ground that the petitioning creditor's debt did not become due till after the commission had issued; and the commission was accordingly superseded on the 3d of *March* 1814. On the 1st of *February* 1814, the plaintiff, in consequence of a supposed defect in the title, had written to the defendants, and likewise to the assignees, stating that he abandoned the purchase, and requiring an immediate return of the deposit; the assignees, however, insisted that the contract should be completed. On the 4th of *March* 1814, a second commission issued, on which *Price* was again declared bankrupt; and on the 22d of *March* 1814, the same persons were chosen assignees under the second commission.—The question for the opinion of the court was, whether, as the first commission had been superseded, the assignees could enforce the contract against the plaintiff; and consequently, whether they were intitled to retain the deposit for which this action was brought.—The case on this day came on for argument, when

Mr. Serjt. *Best*, who was to have argued on the part of the plaintiff, was stopped by the court; who called on the defendant's counsel to go on.

Mr. Serjt. *Copley*, accordingly, observed, that the same persons had been chosen assignees under the second commission as under the first; that no precise time had been fixed for completing the transaction; and that it would have been sufficient, if a good title had been made out, though after action brought. He contended that, on the first of *February*, when the plaintiff renounced his pur-

chase, the assignees had the legal estate, for the commission had not then been superseded.

Lord Chief Justice GIBBS.—The assignees could not then have proved a petitioning creditor's debt, and without that, they could not have made out a good title. If the plaintiff had brought this action at the time when he gave notice that he should abandon his purchase, and had proved the facts which afterwards induced the chancellor to supersede the commission, he would have been intitled to a verdict, for in fact no commission then existed; *rebus existentibus*, therefore, the assignees were not in a condition to support their contract.

The rest of the court concurred.

Judgment for the plaintiff.

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MACKIE v. LONDON.

Wednesday,
June 7.

THIS action was brought to recover certain penalties incurred under the 11th section of the *Pilot act*, 52d Geo. 3, c. 39. (a), and was tried before Mr. Justice *Chambre*, at *Maidstone*, at the last assizes for the county of *Kent*. It appeared that the defendant was master of a ship, homeward bound from *Guadaloupe* to *London*; that the ship was hailed by a pilot boat as she was passing *Dungeness*, but

The penalties imposed by stat. 52 Geo. 3, c. 39, s. 11, on ships neglecting to take in a pilot on arriving off *Dungeness*, are to be calculated, on ships bound for the river, not on the pilotage due from *Dungeness* to the *Downs*, but on that which would be due on the ship's arrival at her ultimate place of destination in the river.

(a) This section enacts 'that the commander of any vessel, coming from the westward, and bound to any place in the *Thames* or *Medway*, not having a qualified cinque port pilot on board, shall, on the arrival of such vessel off *Dungeness*, display the signal for a pilot to come on board, and shall use all practicable means to facilitate such pilot getting on board; and if he shall neglect so to do, or shall decline to take such pilot on board, he shall forfeit double the sum which would have been demanded for the pilotage of such vessel, and the further sum of £5 for every 50 tons burthen of such vessel.'

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that she refused to bring to, and proceeded without a pilot. A question was made as to the amount of the penalties to be recovered; the defendant contending that, according to the table of the respective rates to be received by the pilots (*a*), by which a specific sum was given for pilotage from off *Dungeness* to the *Downs*, the double of that sum *only* could be recovered by the plaintiff. A verdict was accordingly taken to that amount, with liberty to the plaintiff to move to enter it on another count, for double the whole sum due from *Dungeness* to the river.

Mr. Serjt. *Best* having, for that purpose, obtained a rule *nisi*,

The *Solicitor-General* now shewed cause against it. If the act had given one sum for any entire voyage, the demand would be the double of that sum; but the schedule B. had expressly distinguished between the voyage from *Dungeness* to the *Downs*, and that from the *Downs* to the different stations in the river; and there was a separate table for each. If a pilot had gone on board at *Dungeness*, he would have been entitled to five guineas on the ship's arrival in the *Downs*; if she had left the *Downs*, he would have had a new demand. Whatever was the ultimate destination of the ship, after leaving the *Downs*, the two voyages were quite distinct.

Mr. Serjt. *Best*, *contra*, said it was quite clear that the legislature meant to give a penalty according to the whole voyage; and the body of the act was not to be controlled by the schedule. The schedule was only for the purpose of settling the rates of pilotage; the penalties were to be calculated by the intended destination of the ship. The learned serjeant was here stopped by the court.

Lord Chief Justice GIBBS.—I do not see any means by which the penalties are to be ascertained, except by the

(a) Schedule B. of the act.

pilotage for the voyage intended to be performed, and for which the ship is bound to have a pilot. When the act says that every commander, declining to take a pilot on board, shall forfeit double the amount of the sum which would have been demanded for the pilotage of the vessel, we must understand that to mean double the amount of the pilotage to which a pilot would have been entitled, if he had been taken on board, and had gone the remainder of the voyage, during which it was necessary to have a pilot.

The rest of the court concurring, the rule was made
Absolute.

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KENT v. YATES.

Friday, June 9.

Mr. Serjt. *Best* had, on a former day in this term, obtained a rule to shew cause why the interlocutory judgment signed in this cause on the 31st of *May* last, and the subsequent proceedings had thereon, should not be set aside for irregularity; on the ground that the writ was returnable the last return of *Easter* term; that a declaration was delivered after the esoin day of the present term; and that, consequently, the defendant was entitled to an imparlance. It appeared that the defendant had put in bail on the 10th of *May*, but that they did not justify till the first day of the present term; and the declaration was accordingly delivered *conditionally*, on the 25th of *May*.

Where a writ is returnable the last return of one term, and the defendant does not justify bail till the first day of the next term, he is not entitled to an imparlance, though the plaintiff do not deliver a declaration *de bene esse*, till after the esoin day of the second term.

Mr. Serjt. *Vaughan* now shewed cause against the rule, and contended that the plaintiff had been guilty of no *laches*; for he could not declare *absolutely* till the defendant was in court, and he was not obliged to declare *de*

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*bene esse*, as appeared by the case of *Bailey v. Hantler* (a); and this was also the practice of the *King's Bench* (b).

Mr. Serjt. *Best*, *contra*, admitted that a plaintiff was not bound to declare *conditionally*; but if he chose to do so, he contended that it fell within the general principle, that if the declaration were not delivered before the *essoin* day, the defendant was entitled to an *imparlance*;—there was no reason why a declaration *de bene esse* should not be delivered before the *essoin* day, as well as after it.

Lord Chief Justice GIBBS.—Generally speaking, when a writ is returnable the last return of a term, unless the declaration be delivered before the *essoin* day of the succeeding term, the defendant is entitled to an *imparlance*; but that supposes that the defendant has done every thing which he is bound to do. Here, the defendant had not justified his bail before the first day of this term; the plaintiff, therefore, was not in a condition to declare absolutely before the *essoin* day. The ground of the objection is, that the plaintiff should have proceeded more expeditiously, which he could not have done unless he had delivered a declaration *de bene esse*; and *that*, the cases cited shew that he was not bound to do.—*Per Curiam*,

Rule discharged.

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(a) 2 B. & P. 126.—(b) *Rolleston v. Scott*, 5 T. R. 372.

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LITTLEWOOD and another, v. WILLIAMS, clerk.

Friday, June 9.

THIS was an action for money had and received, and was brought by the churchwardens of the parish of *Hendon*, in the county of *Middlesex*, to recover from the defendant, the vicar of that parish, a moiety of certain fees, which he had received, and which they claimed to be due to them as churchwardens, for the use of the parish, on the burial of non-parishioners in the churchyard. The cause was tried before Lord Chief Justice *Gibbs*, at *Westminster*, at the sittings after last *Easter* term, when it appeared by the proceedings at different vestries, that there had been agreements between the churchwardens and vicar, for the time being, as far back as the year 1727, that certain fees should be paid for every stranger who should be interred in the churchyard;—one half to the vicar, and the other half to the churchwardens for the use of the parish. The fees had been regulated and augmented from time to time, by the vicar and parishioners in vestry. It appeared that about the year 1757, a piece of ground had been purchased by a subscription of the parishioners, and annexed to the churchyard, and consecrated; but it seemed to be admitted on all hands, that this additional ground vested in the vicar, in like manner as the rest of the churchyard. The defendant was inducted to the vicarage in the year 1812, and refused to enter into any agreement on the subject, denying that any right existed on the part of the churchwardens to receive any proportion of these fees, and claiming the whole of them as due to himself; and demanded of and received from the sexton, who had been accustomed to collect these fees for the joint use of the vicar and churchwardens, the amount of several fees which he had re-

An agreement having existed between the successive vicars and churchwardens of a parish, that certain fees should be taken upon the burial of strangers in the churchyard, and divided equally between them; the incoming vicar refuses to accede to that agreement, and prevails on the collector of the fees to pay over to him the whole of what he then has in his hands:—*Held*, that the collector having received one half of these fees to the use of the churchwardens, they are entitled to recover that moiety from the vicar, in an action for money had and received.

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ceived, and for the moiety of which the present action was brought.—The *Chief Justice* directed a verdict for the plaintiffs, subject to the opinion of the court, whether they were entitled to recover.


Mr. Serjt. *Lens* having, on a former day in this term, obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered,


Mr. Serjt. *Vaughan* and Mr. Serjt. *Copley* now shewed cause against it. They admitted that there was no assent on the part of the defendant to divide these fees with the churchwardens; but independently of the respective rights of the parties, the sexton was to be considered as the agent of both parties, and as having received half the fees in question to the use of the plaintiffs. The defendant, when he found that an agreement had been entered into by his predecessors, to which he did not chuse to become a party, should have contented himself with giving notice to the person receiving the fees, that he should in future consider them as received for his use only, with a direction not to pay over any part of them to the churchwardens. Until such notice, the sexton was not divested of his character of agent to both parties.—With respect to the right of the churchwardens, they contended that it was a good custom to divide the fees taken for interment, as appeared by 2nd *Shower* 184.

Mr. Serjt. *Lens* and Mr. Serjt. *Best*, *contra*, were desired by the court to confine their argument to this point;—that, supposing the plaintiffs had no legal right to these fees, yet, that the defendant had received the money from their agent.—As to that, they contended that there was a material distinction between the claim which the plaintiffs might have upon the sexton, as their agent; and that which they pretended to have on the defendant, who was another litigating party, asserting a right adversely to that of the plaintiffs. The plaintiffs might recover it

from their agent, but as the defendant did not stand in that character, but had received the money from the agent of the plaintiffs; the latter were put to their mere right, and it was necessary for them to make out a clear and indisputable title to the money, as between themselves and the plaintiff, without any regard to the question as to the defendant's claim:—If they did not, the rule '*potior est conditio possidentis*' must prevail.

Lord Chief Justice GIBBS.—The claim of the plaintiffs is founded on their right to certain fees, on the burial of strangers in the churchyard. At common law, no such right exists; and though it may be established by custom, it can then be only claimed by invariable and immemorial usage. There was no colour for saying that the churchwardens had a strict legal right to these fees, and it was therefore found necessary to adopt another course; viz. to shew that an agreement had existed between the former vicars and churchwardens. The evidence, however, did not support that part of the case, as to the defendant; for it appeared that he had refused to accede to the agreement. I reserved the point, because it occurred to me that, perhaps, the case might be supported on another ground; viz. that, under all the circumstances under which the defendant received this money, he might be taken to have received it to the use of the churchwardens. That brings us to the consideration of what they had a right to do, and of what they have done. Now, I do not apprehend that the churchwardens would be liable to censure, either by the civil or ecclesiastical law, for joining with the vicar in permitting strangers to be buried in the churchyard, and receiving fees for that permission; provided no inconvenience were sustained by the parish: And if the body of a stranger were deposited in the churchyard under such agreement, I am of opinion that an action might be sustained against

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the executors of such person for the fees of his interment. This I take to be the law of the case. With regard to the facts, it appears that this agreement had existed between the former vicars and churchwardens; and that the sexton had been accustomed to collect the fees, and to pay them over to each from time to time. Thus stood the case up to the time when the defendant became vicar. He would not consent to this division of the fees, but claimed to have the whole of them. On these facts, I am of opinion that, the moiety of these fees having been paid to the person who was accustomed to receive them for the churchwardens, was received for them, and that the vicar had no more right to it than to the money of any other person; and that, as he had prevailed on the sexton to pay that to him, which was in fact the property of the churchwardens, they had a right to recover it back from him. The verdict, therefore, ought to stand.

The rest of the court concurred.

Rule discharged.

Friday, June 9.

Sir SAMUEL ROMILLY, knight, v. JAMES.

*A.* devises to his brother *B.* all his real and personal estate, subject to subsequent de-

*vices* and legacies;—then, as to part of his lands, to *B.*'s son, *C.*, and his heirs for ever; and if *B.* and *C.* should die, *having* no issue of either of their bodies, then all his real estate to *D.*—*A.* dies, and *B.* and *C.* levy a fine of the premises bequeathed to *C.* to the use of themselves, their heirs and assigns for ever; and *C.* suffers a recovery of the same premises to his own use.—*B.* dies in 1760, having had no other issue but *C.* *C.* dies in 1779, never having had any issue. *D.* dies in 1785, neither he, nor any one claiming under him, having ever had possession of the premises.—*Held*, 1st, that the devise over to *D.* was not an executory devise, but a remainder, limited after successive estates tail of *C.* and *B.* by implication:—2dly, supposing it to have been an executory devise, contingent on *B.* and *C.* dying, *having* no issue, &c.; *semble*, that that event had not happened:—3dly, *Semble*, that *D.* or his heirs could not have had a writ of intrusion, supposing the right to have been in *D.*—4thly, if he could, *quære* whether he would not have been barred by the statute of limitations, or by the fine levied by *B.* and *C.*

brought on the alleged insu<sup>p</sup>iciency of the title to be derived from *H. Smith* the younger, hereinafter mentioned. The cause was tried before Lord Chief Justice *Gibbs*, at the sittings after last *Michaelmas* term, at *Guildhall*, when a verdict was found for the plaintiff, subject to the opinion of the court on a case, of which the following is the substance.

*Thomas Smith*, being seised in fee simple of considerable estates in the counties of *Hereford* and *Radnor*, by his will, dated the 26th of *September* 1738, devised to his brother, *Henry Smith*, all his real and personal estate, of what nature or kind soever, subject to the several devises, legacies, and bequests, thereinafter particularly mentioned. The testator then bequeathed to his wife an annuity of £80, payable out of his real and personal estate, during her life, in lieu of her settlement, with part of his furniture; and to his nephew *Josias Clerk* a legacy of £600. He then gave and bequeathed to his brother's son, *Henry Smith*, from the decease of his the testator's wife, (she having a life estate in the premises, under her marriage settlement) all his estate in *Radnorshire*, called the '*Meadows under Stanner*,' being the premises in question, to hold to him and his heirs for ever. The testator then bequeathed numerous legacies to his relations, and other persons, and charged the whole of his real estate with the payment of £10 a year to his sister; then he devised a freehold house in *Hereford*, to stand charged with the payment of 24s. a year, and certain rents issuing out of other houses in *Hereford*, for charitable purposes. At the conclusion of the will, immediately before the appointment of executors, were the following words: 'And further also my will and meaning is, that in case my brother and his son, my nephew', (meaning the said *H. Smith* the younger, and devisee of the premises in question) 'should happen to

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‘ die, *having* no issue of either of their bodies, then, and in  
 ‘ such case, I give and devise all my real estate to my  
 ‘ nephew *Josias Clerk*, and his heirs for ever, subject  
 ‘ to the payment of £600 to certain of his relations.’  
 The testator, having appointed his brother and heir at  
 law, *H. Smith* the elder, executor of his will, died shortly  
 afterwards, leaving his said brother, and his nephew *H.*  
*Smith* the younger, surviving him. By indenture, dated  
 the 8th of *September* 1739, the two *Smiths* covenanted to  
 levy a fine of the premises in question, to inure to the use  
 of themselves, their heirs and assigns for ever; which fine  
 was duly levied on the 1st of *September* 1740. By inden-  
 ture of lease and release, dated the 28th and 29th of  
*June* 1742, between *H. Smith* the younger of the first  
 part, *R. Symons* of the second part, and *R. Hankins* of the  
 third part, (though the said *H. Smith* the elder was still  
 alive, and his seisin as joint tenant continued) the said *H.*  
*Smith* the younger, in consideration of five shillings, did  
 bargain, sell, and release the premises in question to the  
 said *R. Symons*, his heirs and assigns for ever, to the in-  
 tent to make him tenant to the *præcipe* in a common re-  
 covery, which it was thereby declared should inure to the  
 use of *H. Smith* the younger, his heirs and assigns for  
 ever, and which was duly suffered accordingly. *H.*  
*Smith* the elder died about the year 1760, and had issue  
 no other than the said *H. Smith* the son. *H. Smith* the  
 son died in the year 1779, without ever having had any  
 issue. *J. Clerk* was living at the death of *H. Smith* the  
 younger, and for more than five years afterwards; and  
 laboured under none of the disabilities mentioned in the  
 saving clauses of the statutes of limitation. He died in  
 the year 1785. Neither *J. Clerk*, nor his heirs, nor any  
 other persons claiming under him, ever had possession of  
 the premises in question.—The question for the opinion

of the court was, whether the plaintiff were entitled to recover.—The case came on for argument on a former day in this term, when

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Mr. Serjt. *Lens*, for the plaintiff, premised that the real question was, whether the vendors, who claimed under *H. Smith* the younger, could make out such a title as the plaintiff would be obliged to receive. The questions, as they occurred in order, were, *first*, whether *H. Smith* the younger took an estate tail, in which case the entail had been barred by the recovery; or whether, as he contended, *H. Smith* did not take a defeasible fee simple:—In other words, whether it were not an executory devise in favour of *J. Clerk*, on the two *Smiths* dying, having no issue of either of their bodies:—*Secondly*, whether that event had happened:—*Thirdly*, if it had, whether *J. Clerk*, or his heirs, (the lapse of 20 years having deprived them of their remedy by ejectment,) could have a writ of intrusion; that is, whether a writ of intrusion would lie for an executory devisee in fee, after the determination of a defeasible estate in fee:—*Fourthly*, if it would lie, whether he were barred by the statute of limitations, 32 *Hen. 8, c. 2.*:—And *fifthly*, if not, whether he would not be barred by the fine levied in 1740. If either of these questions should be decided in favour of the vendors; that is, against the claim of *Clerk*; the rest, he admitted, would fall to the ground, and the plaintiff would not be entitled to recover the deposit. As to the *first* question, he contended that, the former part of the will having given to the *Smiths* an estate in fee, the latter disposition had only provided that the lands should go over to another person, on the happening of a particular event. This did not give them an estate tail indefinitely; it was only applying and modelling the former devise, according to the intention of the testator. *Secondly*, if this were to be considered as an executory devise,



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then, whether the event which the testator had in contemplation had happened. That, he said, depended on the construction to be put on the clause 'if the two *Smiths* should die, *having* no issue of either of their bodies;' whether it meant *having had* no issue at any time, or whether, as he contended, it did not mean *leaving* no issue respectively. There was no case exactly in point, for though in the cases of *Porter v. Bradley* (a), and *Roe v. Jeffery* (b), it was held that if there be a devise to A. and his heirs for ever, and, if he die *leaving* no issue, or *leaving* no issue *behind him*, then over, the subsequent limitation is good by way of executory devise; yet there, he admitted, the word '*leaving*' made a distinction. In *Weakley v. Rugg* (c), where an estate was given to one daughter, and if she died without *having* children, to another, Mr. J. Lawrence said, that the word *having* referred to the time of the death, otherwise it must be read '*having had*.'—Thirdly, supposing *Clerk* to take an executory devise, could he or his heirs have a writ of intrusion? It would be insisted that a tenant for life only could have this remedy; but a devisee, he said, had no *formedon* like a tenant in tail, to whom the *formedon* was *quasi* his writ of right; and though it did not therefore necessarily follow that he should have this other remedy, yet in *Eastman v. Baker* (d) a writ of intrusion had been brought by the devisee; and though it passed *sub silentio*, yet as no objection was made to it, it was at least a negative authority in his favour. If, however, the writ of intrusion were not exactly the proper remedy, it was, at all events, so similar, that though the principle of forming a writ *in consimili casu* (e), did not strictly apply to a devisee, yet the

(a) 3 T. R. 143.——(b) 7 T. R. 589.——(c) 7 T. R. 356.  
 (d) 1 Tamm. 174.——(e) Given by stat. *Westm.* the second, 13 Ed. 1, c. 24, for the reversioners after the alienation, but during the life of the tenant in dower, or other tenant for life. 3 Bl. Com. 183, *note* 1, 11th ed. F. N. B. 206.

court would allow a small departure in the writ, to adapt it to a particular case, *cadenti sub eodem jure*. Here it might be adapted, merely by not introducing a strict tenancy for life. [Lord C. J. Gibbs.—Is there any instance, except in *consimili casu*, where a new writ has been granted? The strongest case that I recollect is, where it has been held that the assignees of a bankrupt may maintain a writ of entry, or a writ of right; but that depends on the statutes of bankrupt, which give the assignees the same remedy as the bankrupt would have had.] *Fourthly*, as to the statute of 32 H. 8, c. 2, he contended that the limitation of that statute only applied to cases where there had been an adverse enjoyment, which was not the case in the present instance. *Lastly*, with respect to *Clerk* and his heirs being barred by the fine, he contended that there existed no estate, when the fine was levied, on which it could operate; *H. Smith* the younger was tenant in fee, and had no imperfect estate, by enlarging which he could give an estate to any other; the person ultimately interested had not then even an inchoate title. In *Focus v. Salisbury* (a) Lord Hale said, ‘a fine, with 5 years non claim, must bar an estate *precedent* to the fine, not *subsequent* to it.’ So 9 Co. 106, elucidated and corroborated by 10 Co. 95.; *Carthew* 75. The stat. 4 Hen. 7, c. 24, only gave effect to the 5 years non claim, but gave no additional validity to the fine, which could only operate on an estate in existence at the time when the fine was levied.

Mr. Serjt. Copley, *contra*, contended, *first*, that the true construction of this devise was, that *H. Smith* the younger should take an estate tail, with remainder in tail by implication to his father; being cut down from the fee ori-

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ginally granted. He cited *Tenny v. Agar* (a), where the devise was to the testator's son, and his heirs for ever, upon condition to pay his sister a certain annuity; and in case the son and daughter both died without *having* any issue, over to another;—the court held that the devise over was not an executory devise, but a remainder limited after successive estates tail of the son, and of the daughter by implication. That case, he said, was as similar to the present, as it was possible for cases of this kind to be; except that the present case was still stronger, because it was natural for the testator to contemplate that the father would die before the son, and then the son would have taken an estate tail by implication of that part which was not expressly devised to him. The general rule was, that the courts would not construe a devise to be executory, if they could avoid it; and that principle was recognised in 17th *Vasey*, 479. The cases which had been cited by the other side on this question were perfectly distinguishable from the present, by the expression '*leaving* no issue' instead of '*having* no issue.' [Lord C. J. Gibbs. It cannot be contended that the general words, '*having* no issue,' can be construed to imply *leaving* no issue at the time of the testator's death.] That being so, *secondly*, even supposing this to be an executory devise, the contingency on which it was to take place had not happened; for it could only have happened in the event of the father dying before the son.—*Thirdly*, admitting it to be an executory devise, and the contingency to have happened, he contended that *Clerk* had lost all remedy by the lapse of 20 years. The different writs had been drawn with great nicety and precision, and the writ of intrusion would only lie in the three cases of reversioner after tenant for life,

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(a) 12 *East*, 253.

of tenant in dower, or tenant by the courtesy (*a*). The only instance of a writ framed on the statute of *Westminster*, which, he said, was now to be considered as almost obsolete, was that which was strictly called the writ '*in consimili casu*' (*b*), and which followed its model very closely. If a new writ were to be framed on the present occasion, it would rather be on the *formedon in reverter*, as being more analogous to it than the writ of intrusion; and then, again, the lapse of 20 years would operate as a bar. But *fourthly*, if the writ of intrusion were the proper remedy, it would be barred by the statute of 32 *Hen.* 8, c. 2, because the person claiming must count in a possessory action within 50 years from the seisin of his ancestor; *Clerk* never having entered; for it must be on an actual seisin (*c*). [Lord C. J. *Gibbs*.—Can it be law, that if the tenant for life live for 50 years, the remainder-man loses his remedy?] That particular remedy, he said, was lost. *Lastly*, he contended, that if the devise were executory, it would be barred by the fine. It was true that the fine must have something on which to operate, and which it might displace; but it was not necessary that the estate should be in existence at the time when the fine was levied, although the five years would not begin to run till the estate was *in esse*. In the present case, the younger *Smith* being seised in fee, had levied a fine which could not then operate; but as soon as the estate on which it was to operate arose, the five years would begin to run.

Mr. Serjt. *Lens*, in reply, recapitulated the grounds of his former argument, and concluded by observing, that the question was, not as to the remedy which *Clerk* or his representatives might have; but whether the vendors could establish so clear a title that the plaintiff would be obliged to accept it.

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(*a*) *F. N. B.* 203.—(*b*) *Ante* 596, note (*c*).—(*c*) 32 *Hen.* 8, c. 2, s. 6, and see *Bevil's case*, 4 *Co.* 10.

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Lord Chief Justice GIBBS.—This case has been extremely well argued, and the court will take time to consider it; but there is one point on which I shall now make an observation. It is intimated, that if any doubt can be cast on the title of the vendors, the plaintiff will be entitled to recover back the deposit. Now if he had gone into a court of equity, the chancellor would not, perhaps, have obliged an unwilling purchaser to ratify the contract. But if he come into a court of law to recover the deposit on the ground of an insufficient title, he must abide by the decision of that court; and that is the difficulty which the party has brought upon himself by coming into a court of law.

On this day the Chief Justice delivered the opinion of the court. His lordship, after stating the case, said:—The question is, whether under all the circumstances, *H. Smith* the younger would be able to make a good title to a purchaser. The way in which the objections to the title have been stated, in substance, is this:—*First*, it is said by the plaintiff that *H. Smith* the younger took a defeasible fee simple,—defeasible on the event of his father and himself both dying *having* no issue; that neither did leave any issue, and therefore, that the event which was in contemplation did happen. The plaintiff's argument is then directed to the answers which might be made to this objection. *First*, it would be said that *Clerk's* estate was barred by the fine and non-claim; to which the plaintiff answered, that though a fine had been levied by both the *Smiths*, and though five years had since elapsed, yet that this was a case to which the doctrine of non-claim did not, under the circumstances, apply; because, being an executory devise, though it was transmissible from ancestor to heir, yet that the estate was not displaced by the fine. *Lastly*, as to the remedy which was left to *Clerk*, it was

contended, that he might have a writ of intrusion, though not an ejectment; and though it was true, generally speaking, that a writ of intrusion would in strictness only lie for a tenant for life, yet that under statute *Westm. 2.*, a writ might be shaped in the same way, and provide a similar remedy.—These, as well as I can recollect, are the answers which it was supposed would be made to the plaintiff's objections, and the mode in which it was attempted to dispose of them. The principal question is, what estate *H. Smith* the younger took under the will: If he took an estate tail, all the other questions are out of the case; for then, being tenant in tail, he levied a fine with his father, which would certainly displace *Clerk's* estate; and then the non-claim would operate on that estate so displaced. We are of opinion, that *H. Smith* the younger did take an estate tail. By the first limitation of the will, the testator devises to *H. Smith* the elder, in fee, all his estates which are not afterwards otherwise disposed of: then follows the devise to *H. Smith* the younger, which revokes the former devise to *H. Smith* the elder, of the premises in question, and gives them in fee to the younger *Smith*; but by a subsequent clause, in case both the *Smiths* should die *having* no issue, all the testator's real estate is devised over to *Clerk*. This plainly cuts down the fee, which would otherwise have been devised to *H. Smith* the younger, to an estate tail; and shews that by the word *heirs* in the devise to him, the testator meant heirs of his body. In this state of the case, however, something is left beyond these particular estates, under the original devise to the elder *Smith* in fee; and there would accordingly be an estate tail to *H. Smith* the younger, with remainder in fee to his father. But the same devise which cuts down the fee of the younger *Smith*, operates in the same way on that of his father. Something is consequently still left over in remainder, and we think, therefore,

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that *H. Smith* the younger takes an estate tail, remainder in tail to his father, remainder over in fee to *Josias Clerk*. It has been contended, that this was not an estate tail in the younger *Smith*, but was an executory devise, contingent on the event of both the *Smiths* dying *having* no issue of either of their bodies; and that that expression means *leaving* no issue. But there is no case to prove that; and if the bequest be not capable of that construction, it can only receive that which has been above stated; and the *Smiths* having levied a fine, the remainder-man is barred by the statute of 4 *Hen. 7, c. 24*. This being the opinion of the court upon that point, it is sufficient to shew that those under whom the plaintiff purchased can make a good title, and it is therefore unnecessary to give any decision on the other points.

Judgment for the defendant.

Saturday,  
 June 10.

ADAMS, demandant;—RADWAY, tenant.

The court will not assist the demandant in a writ of right; and therefore will not allow him to quash a writ of summons which has been irregularly executed.

MR. Serjt. *Pell* moved, on the part of the demandant in this writ of right, for leave to quash the writ of summons to the four knights, (who chuse the twelve to try the right;) on the ground that no previous notice of executing it had been served on the tenant's attorney. The application, he said, was made in the demandant's own delay, *ex majori cautela*, lest it should be objected that the tenant would have had a right to challenge the four knights. For though it was laid down by Lord *Coke* (s), that they could not be challenged, the contrary appeared

by 15 *Edw. I.* 4. and the manner in which they were to be challenged was there stated.

Lord Chief Justice GIBBS.—The rule which has been adopted on consideration is, that as a writ of right generally seeks to disturb a possession which has continued for a considerable length of time, the court will not assist the demandant in getting over any difficulties that may occur to him.

The rest of the court concurred in the opinion of the Chief Justice; Mr. Justice *Heath* observing, that it was in general a very vexatious proceeding; and accordingly the application was

Rejected. (a)

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(a) See 2 *Williams's Saund.* 45, note (4), on the proceedings in a writ of right.

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HUTTON v. EYRE.

Wednesday,  
June 14.

THIS action was brought to recover the sum of £2788, with interest, for money paid to the use of the defendant, and was tried before Mr. Justice *Bayley*, at the last assizes for the county of *Lincoln*, when the following facts were admitted by both parties.—The plaintiff and defendant, being in partnership together as merchants and in-  
Two partners, *A.* and *B.*, on the 26th of *August* 1809, agree to dissolve partnership as from the 1st of *January* 1810, and that neither of them shall, after signing the deed of dissolution, make any purchase to bind the other; but that every such purchase shall be on his own private account. On the 27th of *October* 1810, *A.* assigns his property to his creditors, who covenant not to sue him, and that if they do, the deed of assignment shall be a release to him, which deed is signed by *B.*—*A.*, after signing the deed of dissolution, having contracted debts in the name of the firm, *B.* pays them.—*Held*, 1st, that *B.* was liable for those debts, the covenant not to sue *A.* not operating as a release to *B.*—2dly, that, supposing it had, the creditors would have had an equitable claim on *B.*, which would have justified his paying the money; and, therefore, that *B.* was entitled to recover it from *A.* as money paid to his use.



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insurance brokers, on the 26th of *August* 1809, entered into a deed to dissolve the partnership, as from the 1st of *January* then next; in which deed, among other things, it was mutually covenanted and agreed, 'that neither the plaintiff nor defendant should, after the signing of that deed, and before the said 1st of *January*, either in his own name, or in the name or names of any other person or persons, or in the firm of *Eyre and Hutton*, make any purchase of goods in their said business, or by way of speculation, so as to bind the other of the said parties to such contracts. But if any purchases of goods were made by either of the said parties, the same, though made in the partnership firm, should be on the private account of the individual party making the same.' The notice of dissolution did not appear in the *Gazette* till the 24th of *January* 1810. On the 27th of *October* 1810, the defendant executed an assignment of all his property to trustees for the benefit of his creditors; in consideration of which, the creditors covenanted and agreed with the defendant not to sue him on account of any debt due to them from him; and that in case they did sue him, the deed of assignment should be a sufficient release and discharge for him. This deed was executed by several creditors, and among others, by the plaintiff, 'for the late firm of *Eyre and Hutton*.' When the assignees examined into the defendant's affairs, it appeared that, between the time of executing the deed of dissolution and the 1st of *January* 1810, the defendant had contracted different debts to the amount of £3658, in the names, and under the firm, of *Eyre and Hutton*. In 1812 the assignees paid a dividend of 5s. in the pound, leaving a deficiency in the debts contracted by the defendant, since the dissolution, of £2778; which the plaintiff paid to the respective parties, and which was the sum sought to be recovered in the present action.—A verdict was found for the plaintiff, subject to the opinion of the

court, on the following objections, which were made, on the part of the defendant. *First*, that the deed of composition operated as a release, not only to the defendant, but also to the plaintiff, as the defendant's partner; and therefore, that the plaintiff was under no obligation to pay the remainder of the debts, and had consequently paid them in his own wrong.—*Secondly*, that the action, if maintainable at all, should have been on the covenant.

Mr. Serjt. *Vaughan* having, in *Easter* term, obtained a rule  *nisi* to set aside the verdict, and enter a nonsuit,

The *Solicitor-General*, and Mr. Serjt. *Copley*, on a former day in this term, shewed cause against it; but as their arguments, and those of Mr. Serjt. *Vaughan* in support of the rule, were recapitulated very fully by the Chief Justice in his judgment, it is unnecessary to insert them here. The court took time to consider of the question, and on this day their judgment was delivered by

Lord Chief Justice GIBBS.—This was an action for money paid to the defendant's use, to which two objections have been made. One is, that, supposing any thing to be due, it is not recoverable as on a parol contract, but that the plaintiff should have sued as for a breach of the covenant. We are of opinion, that that objection cannot avail; because we think that the whole of the covenant, taken together, amounts to an agreement, that each partner would be responsible for the debts which he should contract after the agreement to dissolve the partnership, although the partnership should remain, as to the rest of the world, till the 1st of *January* following. The defendant, therefore, ought to have paid the debts which he had so contracted; and as, in consequence of his not paying them, the burthen fell on the plaintiff, the money was paid to the defendant's use, and the plaintiff is consequently entitled to recover it as such. The other objection is, that by the composition deed, the plaintiff, as well as the defendant,

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was absolved from all the demands of the creditors; and that therefore he had a legal answer to those demands, of which he ought to have availed himself; and that not having done so, the money was paid unnecessarily, and in his own wrong. In answer to this, the plaintiff alleges that he is not discharged; that the debts were contracted in the name of himself, as well as in that of the defendant; that the covenant, on the part of the creditors, was only that they would not sue the defendant; and that although the defendant, if he had been sued, might have brought a cross action against the creditors, their covenant did not operate as a release of the joint debts. He contends that the law, that a covenant not to sue operates as a release, applies only as between those who are released, and those who give the release; and that this construction is only given to it, in order to avoid circuitry of action. The defendant insists that the rule goes much further; and that the covenant, being a release to himself, operates also as a release to the plaintiff, who was jointly bound with him; and *that*, in fact, is the question. The plaintiff relies on certain authorities, which shew that the law on this subject is not so general, as has sometimes been contended for; viz. that the covenant not to sue one party operates as a release to all. The case of *Dress v. Newhall* (a) has been cited, which was an action on a joint and several bond against one of the obligors, who pleaded a release to his co-obligor, and issue was taken on the release. It appeared that the second obligor had assigned his effects to the obligee, who covenanted not to sue for any debt, &c., in the same terms as in the present case; and that if he did sue, that covenant should be a sufficient release and discharge. It was contended, that this was

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(a) 8 T. R. 168.

an actual release to the party with whom the covenant had been made; and if that were so, it would undoubtedly have operated in favour of his co-obligor; but the court held that it could not so operate, because the reason for such construction, viz. the avoiding a circuitry of action, did not apply. That case, however, is not, in all its parts, similar to the present; because *there*, the parties being jointly and severally liable, one might be sued without the other; and in *Lacy v. Kynaston* (a), that is given as a reason why the rule should not apply. These cases, therefore, not being a direct authority for the present case, we must look to the principle on which the rule has been applied, that a covenant not to sue shall operate as a release. Now where there is only *A.* on one side, and *B.* on the other, the intention of the covenant by *A.* not to sue *B.* must be taken to mean a release to *B.*, who is accordingly absolutely discharged from the debt, which *A.* undertakes never to put in suit against him. The application, therefore, of the principle in that case not only acts in prevention of the circuitry of action, but falls in with the clear intention of the parties. But in a case like the present, it is impossible to contend that, by a covenant not to sue the defendant, it was the intention of the covenantors to release the plaintiff, who was able to pay what his partner might be deficient in. It would have been an easier and a shorter method to have given a release, than to make this covenant. The only reason, therefore, for their adopting this course was, that they did not chuse to execute a release to the defendant, because that would also have operated as a release to the plaintiff; whereas, they considered that a bare covenant not to sue the defendant would not extend to his partner. As, therefore, the terms of the covenant do not

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(a) 12 Mod. 551.

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require such a construction, and as such a construction would be manifestly against the intention of the parties, we are decidedly of opinion, that it ought not to be suffered so to operate. It was rightly contended, that the plaintiff might have been sued alone, and that it was only by pleading in abatement that he could absolve himself, and that he might even have failed in that plea.—But laying that out of the question, we are of opinion, that the rule, that a covenant not to sue operates as a release, applies only to cases where the covenantor and covenantee stand alone, and not where the covenantor is indebted jointly with another. Another ground on which, as it strikes me, the action might be supported, is this:—In *Deas v. Newbell*, Lord Kenyon says, ‘that even if the defendant (the co-obligor) had succeeded in that action, ‘a court of equity would have given the plaintiff (the obligee) full relief.’ Now if the plaintiff, in the present case, had been compelled to pay this money by proceedings in *Chancery*, he would have been entitled to recover in this action.—*First*, then, we are of opinion, that this was the proper mode of action.—*Secondly*, that this covenant to the defendant was no release to the plaintiff; and further, supposing it had been, the creditors would have had an equitable claim on the plaintiff, which would have justified his paying the money, and this would have given him a right over against the defendant.

Rule discharged.

BROWN v. CRUMP.

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**I**N this case, the defendant having demurred to the first count of the declaration, the plaintiff had leave to amend it (a), and added three new counts, not containing any new cause of action, but only varying the former so as to obviate the objection.

Mr. Serjt. *Best*, on a subsequent day, moved that the new counts should be struck out of the declaration, on the ground that the court had only given leave to amend the count demurred to.

Mr. Serjt. *Copley* now shewed cause against the rule, and contended that, though the plaintiff could not have added new counts for a different cause of action, there could be no objection to those which had been added; for they had only changed the form of the consideration, making it executory, instead of executed, as it originally stood.

Mr. Serjt. *Best*, *contra*, observed that, whether the court would have allowed this addition on motion or summons, was not the question;—the defendant should have an opportunity of objecting to them.

Lord Chief Justice GIBBS.—There is no doubt but the plaintiff might have had leave to add these counts, if he had applied for it; because it is evident that what was unnecessary before, may be very necessary now, in order to meet the different circumstances of the case. On the

Where the plaintiff, having obtained leave to amend a count in his declaration, adds new counts, which contain no new cause of action, but only vary the manner of stating that which was demurred to, the court will not order them to be struck out.

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(a) *Vid. supra*, 567.

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other hand, the defendant should have an opportunity of examining the additional counts; and if it appear that there is any material alteration in the statement, they may be struck out; but the new counts being introduced only to vary the *manner* of stating the consideration, the court will not order them to be struck out.

Rule discharged.

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STREET V. BROWN.

Where an instrument is executed by two parties, each keeping one part; if one be lost, the court will not compel the other party to produce his part, in order to support an action against him on the instrument.

MR. Serjt. *Lens*, on a former day in this term, obtained a rule, calling on the defendant to shew cause why he should not produce to the plaintiff the charter-party which he had in his possession, and permit him to take a copy of it; or why the defendant should not, at the cost of the plaintiff, deliver to him a copy of it.—It appeared by the plaintiff's affidavit, that the charter-party had been made between *John Street*, deceased, the owner of the chartered vessel, and the defendant;—that one part was left with the defendant, and the other taken to sea by *Street*, and was lost, together with the vessel;—that this action was brought by the widow and administratrix of the deceased, for not loading the vessel, agreeably to the charter-party in question;—and that the plaintiff could not safely declare without having a copy of it.

The *Solicitor General* now shewed cause against the

rule, and observed that, though the court would interfere, where one instrument, being executed by two persons, was deposited in the hands of one of them, as a trustee for the other; yet, where there was a counter-part of the instrument, as in the present case, the court would not interpose; nor had they any authority, he contended, to call on a party to produce a copy which he never held for the benefit of any other person.—In the cases of *Blakey v. Porter* (a), *Bateman v. Phillips* (b), and *King v. King* (c), the court compelled the production of the instrument in each case, on the ground that the party who had the custody of it was to be considered merely as a trustee. The plaintiff should file a bill in equity for a discovery, and then the defendant would be enabled to state in his answer many things which would be important for him in his defence. [Lord C. J. *Gibbs*.—I should like to hear from the other side, whether it has ever been determined that a party, by bringing an action, can entitle himself to take out of the hands of the other party that which is necessary for him to prove his case:—It does not appear that both these instruments were originals.]

Mr. Serjt. *Leas* admitted that, most probably, they were not both originals; but observed that the application was, not to take the instrument out of the plaintiff's hands, but only to be allowed to take a copy of it.—In the cases cited, the application was much stronger, because *there*, the court were called upon to assist parties who had been evading the stamp duties, by executing only one part of the agreement:—With respect, therefore, to the authority of the court, if it existed in those

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(a) 1 Tawn. 386.—(b) 4 Tawn. 157.—(c) *Ibid.* 606.



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cases, it certainly might be exercised on the present occasion.

Lord Chief Justice GIBBS.—We must look to the principle on which those cases were decided, and must not suffer ourselves to be hurried away into a similar decision, in a case which does not fall within the same principle.—In *Blakey v. Porter*, the circumstances must have been very strong in favour of the application; for Lord C. J. Mansfield asks, ‘Of what use would the defendant’s covenant be, if the plaintiff could not get access to it?’—putting it on the ground of an implied undertaking by the defendant to produce it.—In *King v. King*, he says, ‘he knows not how to refuse the application, after the case of *Blakey v. Porter*;’—hesitating even after that decision;—but, observing, ‘it must be understood that, when one part only of a deed is executed, the party holding it is trustee for the other (a).’ That, therefore, was the ground on which these cases were decided; and it is unnecessary to inquire whether they were such a ground as did give the court authority. Now, here, there were two parts of the instrument, and the plaintiff contends that the defendant must give him a copy of his part, in order that, the original being lost, he may make use of the copy at the trial.—Suppose a bond were executed, and afterwards lost by the obligee, the obligor having kept a copy of it; by the same rule as that by which the plaintiff calls on the defendant in this case, might the obligee demand the copy of the bond from the obligor.—There is no reason to induce the court to grant this application, nor is there any case which has gone to such an extent; and the court is un-

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(a) See his lordship’s, then Mr. Justice Gibbs’s, judgment in *King v. King*.

willing to establish a precedent for such applications.—

*Per Curiam,*

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Rule discharged.

O'KEEFE v. DUNN, and another.

Wednesday,  
June 14.

THIS action was brought against the defendants, as drawers of a bill of exchange, dated the 19th of *June*, 1813, for £1000, payable one month after date to the order of Captain *J. Sinclair*, drawn on Messrs. *Ricketts* and Co., and indorsed to the plaintiff. The first count of the declaration stated that, on the 13th of *July* 1813, the bill was presented to Messrs. *Ricketts* for acceptance, but that they refused to accept it; and averred that they refused so to do by the directions, and at the request of the defendants; by reason whereof, it became unnecessary for the plaintiff to give any notice to the defendants of the non-acceptance. The second count stated that the bill, on the 13th of *July* 1813, was presented for acceptance, but refused; and that the defendants had notice thereof. The defendants pleaded *first* the general issue; *secondly*, that the bills in the first and second count were the same, and that before the supposed indorsement and presentment for acceptance thereof, viz. on the 20th of *June*, 1813, the said bill was presented by the said *J. Sinclair*, (the payee), to Messrs. *Ricketts* for acceptance, and refused; and that Messrs. *Ricketts* had not then received any direction or request from the defendants not to accept it; and that due notice of the said refusal was not given to the defendants.—The replication, after protesting that the second plea was insufficient in law, alleged that the said bill was not presented by the said *J. Sinclair* to Messrs.

The payee of a bill of exchange having presented it for acceptance, which was refused, indorses it to the plaintiff for value, without giving notice of the dishonour, either to the drawer, or to the indorsee. The latter presents it, and it is again refused acceptance, of which the drawer receives due notice:—*Held*, that the drawer was not discharged from his liability to the indorsee, by the payee's neglect to give notice of the previous dishonour.

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*Riplett* for acceptance, and refused, *modo et forma*, &c.—The cause was tried before Lord Chief Justice *Gibbs*, at the sittings after last *Hilary* term, at *Guildhall*, when it appeared that the bill had been presented by *Sinclair* for acceptance, which was refused; and that no notice of that presentment and refusal was given to the defendants; but that the plaintiff was a *bona fide* holder, and had given due notice of the refusal to accept the bill when presented by her. There was no proof that the defendants had directed *Messrs. Riplett* not to accept; and a verdict was accordingly found for the plaintiff upon the second count, and for the defendant on the first count, and on the special plea.

Mr. Serjt. *Vaughan*, in *Easter* term, moved for leave to enter up judgment on the second count, *non obstante veredicto*; on the ground that, though the matter of the special plea had been found for the defendant, yet that that plea did not furnish a legal answer to the action.

The *Solicitor General* and Mr. Serjt. *Leu* now shewed cause against the rule. The plea, they said, had put upon the record what would have been an answer to the case under the general issue. It could not be disputed that if a bill were presented by the payee, or the holder, for acceptance, before it came to maturity, and were refused, such payee or holder was bound to give notice, and could not keep it to present it again, for the purpose of charging the previous parties to it;—that was the principle in *Blesard v. Hurst* (a), and *Goodall v. Dolley* (b); and the object was to protect the drawer, by enabling him to take his money out of the hands of the drawee. Every person, therefore, who took it under a holder who had been guilty of this *laches*, took it subject to all the protections to which the drawer was entitled under the ge-

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(a) 5 *Bur.* 2670.—(b) 1 *T. R.* 712.

neral law; and that protection could not be destroyed by passing the bill into other hands, but must continue throughout the whole currency of the bill. In *Roscow v. Hardy* (a), the holder of a bill, having tendered it for acceptance, which was refused, kept it till it became due, when it was presented for payment and refused, and then returned it on the second indorser, who, not knowing of the *laches*, took it up; and the court held that the second indorser was not entitled to recover against the first indorser:—Lord *Ellenborough* observing, ‘that if the indorsers on a bill be once discharged by the laches of the holder at the time, in not giving due notice of the dishonour, their responsibility cannot be revived, by the shifting of the bill into other hands.’—The two cases, they said, were the same in principle; the drawer in the present case being in the same situation as the first indorser in the case cited:—Every fresh indorsement was, in fact, a new drawing. This was not like the case of an accepted bill; for that was complete in all its parts, and was liable to no contingency, except forgery, &c. Connecting, therefore, the two propositions together, *first*, that, if a bill were presented for acceptance and refused, though there were no necessity for such presentment, the holder was bound to give notice of it to the drawer; and, *secondly*, that, if such notice were not given, the law threw a protection round the drawer, by which he was discharged, not only as to the party guilty of the *laches*, but as to every subsequent holder; it followed that this plea was good. It might fall hard on a *bonâ fide* holder, and might throw a degree of doubt upon unaccepted bills; but the holder must take them at all risks, and must trust to the credit of the person from whom he received them.

Mr. Serjt. *Vaughan*, and Mr. Serjt. *Pell*, *contrâ*, ob-

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(a) 12 *East*, 434, 2 *Camp*. 453, *S. C.*

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served that the defendant was contending for a most alarming proposition in the commercial world ; and that, if it should be established, an unaccepted bill would be no longer a negotiable instrument ; for no person would take it until the very day when it became payable, because he could no longer reckon upon the security of the drawer :—Every bill might labour under the same infirmity as the present ; viz. that an ineffectual attempt had been made to procure an acceptance, before it came into the hands of the holder. The defendant had relied on the authority of *Roscow v. Hardy*, which, however, was very distinguishable from the present. In that case, the bill remained, up to the time of its maturity, in the hands of the party who had been guilty of the *laches* ; and the only question was, whether what passed after it became due had altered the situation of the parties. Here, on the contrary, the bill was passed to the plaintiff for a valuable consideration, while it was still in circulation, and before it became due ; and there was no allegation in the plea, that she had received any notice of the previous refusal to accept.

The court took time to consider of this case ; and on this day, Mr. Justice *Chambre* differing from the rest of the court, the judges delivered their opinions *seriatim*.

Mr. Justice DALLAS, after stating the pleadings and facts of the case, thus proceeded :—The question turns on the validity of the special plea ; and taking it to be doubtful, as we are bound to do, since there is a difference of opinion upon it, it certainly is a question of considerable importance.—It is clear that a bill payable after date need not be presented for acceptance ; but that if it be presented, and refused, the party so presenting it is bound to give notice, and that, in default thereof, the drawer is discharged as to him.—If, therefore, the bill had remained in the hands of *Sinclair*, who had neglected to give notice of the refusal to accept it, when presented

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by him, the drawers would have been discharged as to him. The present action, however, is by an innocent indorsee; for it appears that she gave value for the bill, and it is not alleged on the plea that she had notice of the previous refusal to accept it:—The question, therefore, is, whether she is to stand in the same, or a different situation, from that which *Sinclair* would have been in. It is contended on the part of the defendants, that there is no distinction between them; and they argue on two grounds:—*First*, on the reason of the thing, it is said that, as the drawer is to be presumed to have effects in the hands of the drawee, he is entitled to notice of the refusal to accept, in order that he may withdraw his effects, if he have any in the hands of the drawee, or bring his action, as the case may require; and that is true as to the person to whom that refusal is made: But it is further insisted that this rule is not affected by the bill passing into different hands; for that the drawer is equally injured by want of notice, in whose possession soever it may be. Now that is begging the question; for the question is, whether the drawers do not undertake to be responsible to all holders; or whether the indorsees take the bill, subject to all the conditions and protections to which the drawers contend they are entitled from the payee:—In other words, may not the drawer be discharged as to the payee, and still continue liable to his indorsee? The nature of the contract is, that the drawer, by drawing the bill payable to the order of the payee, holds himself out as liable, in default of the drawee, to all who shall come fairly into the possession of it: He does not stipulate that it shall be presented for acceptance, nor does the law cast such an obligation on the payee; he must, therefore, be content to rest in ignorance as to the fate of it, till it becomes payable. Every body taking it is supposed to be a purchaser for a valuable consideration; and has a right to conclude that

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no presentment has been made, and therefore that no notice is necessary, unless it appear on the face of the bill, by noting for non-acceptance, to be necessary. As to the reason and convenience of the thing, it cannot impede the circulation of bills, that the holder should be required to give notice to the drawer of a refusal to himself; but if it were necessary for every indorsee to ascertain before he took it, whether it had been refused acceptance, it would almost amount to a prohibition to take any unaccepted bill.—Where a bill is indorsed over, after it becomes due, that circumstance is notice to the indorsee to inquire into the cause; and if he do not, he takes it subject to all the equities which would have affected it in the hands of former parties:—But where it is indorsed before due, the indorsee takes it without notice of fraud or neglect, and is entitled to recover against those parties who might have been discharged as to each other. A drawer may therefore be released as to the payee, and yet continue liable to the last indorsee.—The *second* ground of the defendant's argument is the case of *Roscow v. Hardy*, which, they contend, is not to be distinguished in principle from the present. In that case, however, the bill did not pass into the hands of an indorsee, ignorant of the refusal to accept, before the bill became due, and while it was fairly negotiable; but remained in the possession of the party who was guilty of the *laches*, till it became due:—here, on the contrary, the bill was taken in the course of fair negotiation, and at the time of its arriving at maturity, was in the hands of an innocent and ignorant holder.—On both grounds, therefore, I am of opinion that the plea is not a sufficient answer to the action.

Mr. Justice CHAMBER.—I am so unfortunate as to differ in opinion from the rest of the court in this case, and the question is, whether, under all the circumstances, the plaintiff can recover against the drawers, or whether

they are not discharged. It is not contended that there was any negligence in the plaintiff; nor, on the other hand, that the defendants, by drawing without effects, or by any other circumstance, had deprived themselves of any right to which they were entitled in the character of drawers:—All was fair on both sides; but the drawers contend, that they are discharged by want of due notice of the previous dishonour. There can be no doubt but the drawer is entitled, equally with an indorser, to notice of dishonour; whether on presentment for acceptance, or payment. Indeed, the reason is stronger in favour of the drawer than of the indorser; because the indorser has nothing at stake but the amount of the bill, whereas the drawer may, in general, be presumed to have other effects in the hands of the drawee. The consequence then of such omission is, that the holder or proprietor of the bill loses the collateral security of the drawer; his responsibility is at an end, and by what magic it is to be revived I cannot conceive. The warranty of the drawer is only conditional, and all conditions must have been complied with, before he can be made liable upon it. In the present case, the indorsee derives her right from *Sinclair*; how then can she assert against the drawers a claim which *Sinclair*, from whom alone she derives her right, could not have asserted? Three cases have been cited on the part of the defendants; two of which, *Blizard v. Hirst* and *Goodall v. Dolley*, establish the proposition, that if the person who presents the bill for acceptance neglect to give notice of the dishonour, he cannot sue the drawer. But the case of *Roseau v. Hardy* I consider as exactly in point, and in no way to be distinguished from the present:—Lord *Ellenborough's* words are applicable in every particular; and I see no reason why the court should depart from that authority. If the holder of a bill could, by paying it away, protect himself from the consequences of his own *laches*, and entitle his indorsee to sue, it would open a door to infinite

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fraud. It is true, an innocent person will be liable to be deceived by the negotiation of a bill which has been dishonoured. But in what transaction is a man not liable to be deceived? He must seek his remedy against those who have defrauded him; not against those who were discharged by the previous neglect of the parties.—I cannot agree that the law, by which the drawer is discharged by want of due notice, is confined to the case as between the drawer and payee; I think it affects all who are in possession of property of this sort, and I see no reason for making an exception in favour of the claims of a subsequent indorsee. In every case where a person takes an instrument by assignment, (and indorsement is no more than an assignment), he takes it with all its defects, and cannot be entitled to more than the person from whom he receives it. The law cannot be too simple, and exceptions to it should be made with the greatest caution. I am therefore of opinion, that the plaintiff is not entitled to enter up judgment.

Mr. Justice HEATH.—It is not alleged that the plaintiff had notice, when she received the bill, of the previous presentment; and it is of great importance to commerce, that the holders of bills of exchange should be protected, when their claim is fair and legal; and even in cases of fraud, an innocent holder has a remedy against the person from whom he receives the instrument. The same principle which protects a *bona fide* holder in such case, ought to protect the plaintiff in the present case. There is no case which I think is in point; for that of *Roscow v. Hardy* was decided on a different ground. There, the holder of the bill had been guilty of *laches*, in paying it after it became due, without making any inquiries on the subject, and then called on a prior indorser to pay; and his answer was, that he must not be prejudiced by the negligence of the plaintiff. A drawer should

always have assets in the hands of the drawee ; if he have not, it is a species of fraud, and he may be sued immediately.

Lord Chief Justice GRIBBS.—I agree in opinion with my brothers *Heath* and *Dallas* ; and they have entered so largely into the principles on which their opinions are founded, and on which the present case is to be distinguished from those which have been cited, that it will be necessary for me to say very little on the subject. There are two sorts of defence which may be set up to an action on a bill of exchange. *First*, as to the defendant, that he is altogether discharged from any claim of any person whatever ; *secondly*, as to the holder, on account of some incapacity to which he is subject. Of the latter description, is the defence arising from the holder taking the bill on an illegal contract between him and the person from whom he received it, as in the case of usury. But if an indorsee receive it in ignorance of the illegality, he may recover upon it, though the person who indorsed it to him could not.—His lordship observed, that he must be considered as speaking of a bill, good in its origin, but which had been passed from one to another for an illegal consideration ; if it were originally *conceived* in usury, &c. it would be bad against all the world.—When a man draws a bill payable on a future day, he holds out that he will pay it to any person in whose hands it may happen to be when it arrives at maturity, provided the drawee do not pay it. A person taking a bill after it has become due, takes it subject to every objection ; because he knows that it ought to have been paid, and the circumstance of its not being paid ought to have excited his suspicions. But where the bill is indorsed before it becomes due, no such suspicion can occur ; and the indorsee takes it with a legal remedy against all whose names are upon it. A bill which is made payable on a particular day need not be presented for acceptance ; the drawer has no right to

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expect that it will be presented ; and consequently the indorsee, when he receives it, has no reason to suppose that it has been so presented, unless there be something on the face of the bill to denote that it has. This bill, therefore, not having any thing on the face of it to shew that it had been presented, I am of opinion, that any *bona fide* holder was entitled to recover upon it. It is contended, that where notice is necessary, the drawer and all the intermediate parties are discharged by the neglect of it ; but that is begging the question. If the bill be not presented at maturity, when they have a right to expect it will be presented, I think they are discharged ; or if a person should know by any circumstance that it will not be paid when presented, he cannot sue without giving the drawer due notice :—But such circumstance would be no defence, as against a person who had taken the bill without the knowledge of such circumstance, and who had given a valuable consideration for it.—As to the case of *Roscow v. Hardy*, on which the defendants mainly relied, it is distinguishable from the present in one principal feature ; viz: that the bill had remained in the hands of the person who was guilty of the neglect, till it arrived at maturity ; and the drawer then stood discharged from the holder. I am therefore of opinion, that as this was the neglect of the payee, in not giving notice of the refusal to accept the bill, on its being presented before it became due ; and as he afterwards indorsed it to the plaintiff, who was ignorant of the previous dishonour, she is entitled to recover, notwithstanding the plea.

Rule absolute.

END OF TRINITY TERM.

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1. In an action on the case for damaging the plaintiff's wharf, the declaration stated the wharf to be situate near the river *Thames*, to wit, at *Kingston*, in the parish of *St. Saviour, Southwark*, in the county of *Surry*; though there was no

such place as *Kingston* in that parish.—*Held*, that this allegation was to be referred to the venue, and not to the local situation of the wharf; and therefore, that it was not necessary to prove it to be so situated. *Hamer v. Raymond and another*, M. 55 G. 3. 363

2. By a turnpike act, trustees are appointed with authority to cut drains in lands adjoining the roads, making reasonable satisfaction to the owners thereof: By the same act it is provided that all actions, for any thing done in pursuance of the act, shall be brought within *six months* after the doing the thing complained of. A drain is cut, by an order signed by a competent number of trustees, and according to the plan of a surveyor, in land adjoining the plaintiff's, by which the latter is overflowed. An action is brought against one of the trustees only, more than six months after the act

done, and the first injury sustained; but within six months after a subsequent injury accrued.—*Held*, 1st. that the action, if it could have been supported at all, was well brought against the defendant only.—But 2dly, that the trustees, having acted to the best of their skill, and with the best advice, were not answerable for the damage which had accrued. *Sutton v. Clarke*, *H.* 55 G. 3. 429

3. *Said*, that the limitation of the action is to be reckoned, not from the time of doing the act, but of sustaining the injury. *ibid.*
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*See* ARBITRATION, 1, 5, 8.

1. An affidavit, which is annexed to a plea, refers to the plea; and therefore needs not be entitled of the cause. *Prince v. Nicholson*, *H.* 54 G. 3. 70
2. If however, on the objection being made, the defendant entitle it; that is not such an alteration as to make a new stamp necessary. *ibid.*
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against *A.* and several others, *A.* may move the court, if the others be not brought into court, upon an affidavit, entitled of a cause between the plaintiff and *A.* only. *Dand v. Barnes*, *H.* 55 G. 3. 40;

#### AFFIDAVIT TO HOLD TO BAIL.

1. In an affidavit to hold to bail, for money paid to the use of the defendant, it is not necessary to state that it was at the request of the defendant. *Hulton v. Eyre*, *M.* 55 G. 3. 315
2. So, where the affidavit is for work and labour, as the defendant's servant. *Bliss v. Atkins*, *M.* 55 G. 3. 317 (a)
3. An affidavit to hold to bail, stating "that the defendant is indebted to the plaintiff for money paid, laid out, and expended, and wages due to the plaintiff for his services on board the defendant's ship," is sufficient, without expressly stating that the debt is due from the defendant. *Symons v. Andrews*, *M.* 55 G. 3. 317
4. An affidavit of debt, stating that the defendant is indebted to the plaintiff on promissory notes of the defendant, without stating how the plaintiff became entitled to recover upon them, is defective. *Balbi v. Batley*, *H.* 55 G. 3. 424
5. So, where it states the debt to be for goods sold and appraised to the defendant, without saying *by the plaintiff*;—and the court will not suffer an affidavit, thus defective, to be amended. *Fenton v. Ellis*, *E.* 55 G. 3. 535

#### AGENT.

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**VENDOR AND VENDEE, 3, 4, 5, 6, 7.**

1. *A.*, having received money as agent for *B.* and others, in specific proportions for each, pays it over to *C.* as a banker in his own name; and having drawn out part of it, directs *C.* not to pay away the remainder except by his order.—*Held*, that *C.* is bound to hold the money for *A.*, and that therefore *B.* cannot recover the remainder of his share from *C.*, though he had given *C.* notice that *A.*'s agency was at an end. *Pinto v. Santos*, *E. 54 G. 3.* 132
2. *A.*, on the recommendation of his agent, employs *B.* to convey goods to the continent. *B.*, without the knowledge of *A.*, employs *C.* to transact the business, and the goods are accordingly shipped by *C.*, and landed on the continent by *C.*'s agents.—*Held*, that there was no privity between *A.* and *C.*, and therefore that *C.* was not entitled to recover his charges, or those of his agents, from *A.*, though *A.* had not paid the amount to *B.* *Schmalzing v. Tomlinson and others*, *E. 55 G. 3.* 500

**AGREEMENT.**

**See ASSUMPSIT, 3.**

**CARRIER.**

**COVENANT, 2, 3.**

**EVIDENCE, 8, 12.**

**INSURANCE, 3.**

**PARTNERSHIP, 3.**

**VENDOR AND VENDEE.**

That a letter, promising to accept a bill of exchange, requires a stamp, *See BILLS OF EXCHANGE, 2.*

2. *A.* commissions *B.* to get a charter party effected on his ship, *Russian* built and *British* owned. She is accordingly chartered to go to *America*, and take in there a cargo of *permitted goods*; rice and cotton being specified; and to sail therewith to *Cadiz*, *Lisbon*, or *Gottenburgh*, as directed. By a previous agreement, it appeared to have been in the contemplation of the parties to carry the goods to some port in the united kingdom, and that the ship should carry no license:—*Held*, that this was not an illegal contract, so as to deprive *B.* of his right to his commission for procuring the charter party to be effected. *Haines v. Busk*, *E. 54 G. 3.* 191
3. *A.*, the incumbent of a living, and owner of the advowson, agrees with *B.* for the sale of the advowson, and for the immediate resignation of the living; and accordingly tenders his resignation to the bishop, who refuses to accept it.—Another agreement is then entered into between the same parties, for the sale of the advowson only, without any contract for the resignation; and at the same time, by a separate agreement, *A.* grants a lease of the tithes and profits to *B.* for 99 years, if *A.* should so long live; under which lease, *B.* receives the profits till *A.*'s death.—On *A.*'s death the crown presents for that turn only, by reason of simony.—The incumbent presented by the crown dies, whereupon *B.* claims the right to present. It is objected by *A.*'s heir, that the second contract for the sale of the advowson, and the lease of the tithes of the same date, being for the purpose of carrying the former simoniacal contract into effect, was also simoniacal and void.—*Held*, that, whether the second agree-

ment were simoniacal or not, the illegality, if any, extended to the next presentation only; and that therefore, the crown having presented for one turn, B. had a good title to the advowson, and had a right to present on the present vacancy. *Charles Greenwood and Hugh Hammersley, executors of Thomas Hammersley, v. John Lord Bishop of London and George Pawson, clerk*, M. 55 G. 3. 292

4. That an agreement of reference signed by several underwriters requires but one stamp, *See STAMP*, 3.
5. Where the court will not compel a party to produce the counterpart of an agreement, *See EVIDENCE*, 12.

### ALIEN.

*See BILLS OF EXCHANGE*, 10.

### ALLOTMENT.

*See COMMON.*

### AMENDMENT.

*See AFFIDAVIT TO HOLD TO BAIL*, 5.

1. The court will amend a fine, by inserting the parish of A. instead of that of B., in which the lands intended to be passed are erroneously described to have been situated; it appearing that the parties had no such lands in B., and their intention to pass the lands in A. being shewn by describing them as having been in the possession of different occupants;—though there be no general words in fine, and though the deed to lead the uses contain the same mistake as the fine. *Lamb v. Reaston et ux. deforciantis*, M. 54 G. 3. 23

2. The record in a penal action, where the jury by mistake gave damages, being carried by writ of error to the *King's Bench*, the plaintiff may enter a *remittitur* of the damages on the record, and the transcript may be made conformable thereto. *Hardy qui tam v. Cathcart, clerk*, E. 54 G. 3. 160
3. Where an executor pleaded a false plea of judgment recovered against himself, on which judgment was entered up against him for the debt and damages *de bonis testatoris, et si non; de bonis propriis*, and words were afterwards interlined on the judgment roll, by which the judgment *de bonis propriis* was confined to the damages only: The court refused to strike out the words which had been interlined, it not appearing by whom the interlineation had been made, and the judgment being of six years standing. *Burroughs v. Stevens* and others, executors of *Elton*, E. 54 G. 3. 211
4. Where a writ of *fi. fa.* directed the money to be returned *before us*, instead of *before the king's justices at Westminster*, but was tested by the chief justice of C. P., the court permitted the plaintiff to amend on payment of costs. *Simms v. Gurney*, E. 54 G. 3. 237
5. Where to a writ of *venditioni exponas* for goods already taken in execution, with a clause of *feri facias* for the residue, the sheriff returned that he had made of the said goods 20*l.*, but omitted by mistake to return *nulla bona* to the *feri facias*, the court allowed the sheriff to amend the return, and set aside an attachment issued against him for not making the return. *The King v. The Sheriff of Monmouth, in a cause of Lewis v. Roberts*, M. 55 G. 3. 344
6. Where a defendant is entitled to

treble costs by a judge's certificate, under a statute, and judgment is entered up for treble costs *generally*, without stating on what ground the defendant is entitled to them; this is a substantial defect, and the court will not amend the judgment by striking out the word "treble."  
*Dunbar v. Hitchcock*, M. 55 G. 3. 382

7. Where a *capias* is made returnable on a day certain, instead of a general return day, the court will allow it to be amended on payment of costs. *Walker v. Hawkey*, M. 55 G. 3. 399
8. A mistake having been made in the concord of a fine, in the number of messuages to be conveyed, the writ of covenant is altered in conformity to it, but is afterwards restored to its original form: The court will not amend the concord by the writ of covenant so altered, but leave the party to his remedy by a new caption, or by re-acknowledging the concord. *Clutterbuck v. Brabant*, deforciant, H. 55 G. 3. 406
9. A fine is passed of thirty acres of land, twelve acres of meadow, and twenty-five acres of pasture;—in the deed to lead the uses the estate is described as consisting of thirty-five acres in the whole. The court refused to amend the fine by increasing the quantity of each species of land, so as to make each cover the whole quantity intended to be conveyed. *Bartram and another*, plaintiffs, and *Towne and others*, deforciant, H. 55 G. 3. 446
10. Fine amended by inserting a parish, according to the deed to declare the uses, dated subsequently to the fine. *Rowlitt and Marriott*, plaintiffs, v. *Orlebar*, deforciant, H. 55 G. 3. 452
11. Fine amended, by striking out the names of the parishes in

which the lands were erroneously described to be situated; those lands being extra-parochial. *Payne and another*, plaintiffs, and *Garrick and wife*, deforciant, E. 55 G. 3. 468

12. Two fines of different shares in the same lands amended, by stating them to be situated in *A.*, instead of in the parish of *A.*, there being no such parish; the deed to lead the uses of the former fine being correct; that of the latter containing the same mistake as the fines. *Percy Shelly*, plaintiff, and *John Miller and wife*, deforciant; *William Johnson*, plaintiff, and *John Miller and wife*, deforciant, E. 55 G. 3. 519
13. Recovery amended by inserting the parish of *A.* after that of *B.*, in which the whole of the lands to be conveyed were described to be situated; part of the lands being situated in *A.*; that part being particularly described in the deed; and no land, answering to that description, being in the parish of *B.*:—though the parish of *A.* was not mentioned in the deed to make the tenant to the præcipe. *Sidney*, demandant; *Hulme*, tenant; and *Austin and another*, vouchers, E. 55 G. 3. 532
14. Declaration on a writ of partition, and the sheriff's return, amended by striking out an erroneous description of the *quality* of the estates conveyed to the different parties. *Samuel Baker and Phoebe his wife*, and *George Eggleston and Catherine his wife*, v. *Daniel and others*, E. 55 G. 3. 537
15. The præcipe and concord of a fine amended, by inserting the real christian names of the deforciant, instead of those which had been erroneously inserted. *John Grey*, plaintiff, and *John Wainwright and*



- wife, *Thomas Wainwright and wife, Thomas Coverdale and Susannah his wife, deforciant, T. 55 G. 3.* 578
16. Where the plaintiff, having obtained leave to amend a count of his declaration, adds new counts, which contain no new cause of action, but only vary the manner of stating that which was demurred to, the court will not order them to be struck out; though inserted without an order or summons for that purpose. *Brown v. Crump, T. 55 G. 3.* 609

### ANCIENT LIGHTS.

See NUSANCE.

### ANNUITY.

1. In an action on an annuity bond, a plea, stating that a memorial has been enrolled, and, after reciting it, that it was not a good and sufficient memorial, according to the form of the statute; without stating how it is defective, or that no other has been enrolled, is bad on special demurrer. *Simmons v. Hunt, E. 54 G. 3.* 155
2. A., an attorney, purchases an annuity of B., and having paid the consideration money, receives from B. the amount of a bill for business done; including, by mistake, a charge for searches for incumbrances, which searches had never been made.—*Held*, that the payment of this charge, so inadvertently made, was not a return of the consideration money within the meaning of 17 Geo. 3. c. 26. s. 4. *Hurd v. Girdlestone, H. 55 G. 3.* 407
3. The memorial of an annuity, required by statute 17 Geo. 3. c. 26, in reciting the indenture, states, 'that for the better and more effectually securing the payment of the

'said annuity, and in consideration of 10s. the grantor did grant the said estates upon the trusts, and to and for the uses, intents, and purposes therein expressed and declared.' *Held*, that this was a sufficient statement of the trusts of the demise. *Brown v. Rose, E. 55 G. 3.* 478

4. It is not necessary to state in the memorial, the names of the attorneys who are authorized to enter up judgment on the warrant of attorney. *ibid.*
5. Where the witnesses to the indenture and to the warrant of attorney are the same persons, it is sufficient to state them as witnesses to the former instrument, without repeating their names as witnesses to the warrant of attorney. *ibid.*
6. And even though the omission had been fatal to the warrant of attorney, the other parts of the assurance would not have been affected by it. *ibid.*
7. It is no ground for impeaching an annuity, that the memorial does not state the defeazance of the warrant of attorney in the recital of that instrument; it being explicitly set out in the recital of the deed. *Jackson v. Lord Milsentown, E. 55 G. 3.* 533
8. Or that the memorial does not state that the grantor had bound his heirs, &c. according to the deeds. *ibid.*
9. Or that it states the deeds to have been executed on or about such a day; they having, in fact, been executed on that day. *ibid.*

### ARBITRATION.

1. On a motion for an attachment, for filing a bill in equity, contrary to an order of reference, an affidavit that notice of the motion to make the order a rule of court had been

- served on the party's servant, &c. is not sufficient. *Hilton v. Hopwood*, H. 54 G. 3. 66
2. If the day for making the award have elapsed, without any award made, the court will not grant an attachment for disobedience to the order, unless notice of the enlargement of the time have been served upon him. *ibid.*—And See No. 8 of this Article.
  3. Where a cause has been referred to arbitration, the court cannot interfere to enter a nonsuit against the arbitrator's direction; but the party objecting to the award must move to set it aside. *Peters v. Anderson*, E. 54 G. 3. 238
  4. Where a cause is referred to arbitration, the death of one of the parties, at any time before the award made, is a revocation of the arbitrator's authority; and the court will set aside an award made subsequently to such death. *Potts v. Ward*, M. 55 G. 3. 366
  5. Where an arbitrator, having, by mutual agreement of the parties, closed his examination, refuses the application of the defendant's attorney for another hearing, and makes his award; the court will not set aside the award on the affidavit of the defendant's attorney, that he is in possession of evidence which would repel that, on which the award was founded. *Ringer v. Joyce*, H. 55 G. 3. 404
  6. The limitation of time prescribed by the 8th and 9th of W. 3d. for applications to the court to set aside awards, applies only to cases where an original authority is given to the court by that act; and though the court will, in general, adopt the same rule in cases where their authority existed independently of the act; yet, where they see sufficient reason for their interference,

- they will interpose their authority, though the time prescribed should have elapsed. *Rogers v. Dallimore*, E. 55 G. 3. 471
7. That an agreement of reference signed by several underwriters requires but one stamp, See STAMP 3.
  8. Where the time for making an award is enlarged, and the award is made within that time, a party must have regular notice of the enlargement proved by affidavit, or by indorsement on the copy of the submission, or of the rule of court, before he can be brought into contempt for disobedience to it; and it is not sufficient that the arbitrator states in his award that he has enlarged the time. *Wohlenberg v. Lageman*, T. 55 G. 3. 579

### ARREST.

See AFFIDAVIT, TO HOLD TO BAIL. PRACTICE, 5.  
SHERIFF, 2, 4, 6, 7.

1. That an underwriter cannot be held to bail on a policy of insurance, See INSURANCE, 1.
2. For the relief of the bail, where a defendant is held to bail in a civil action, and is afterwards taken into custody on an extent at the suit of the crown; See BAIL, 3.
3. For malicious arrest, See COSTS, 1.
4. Surrender under a foreign attachment not an arrest so as to avoid a subsequent arrest. See FOREIGN ATTACHMENT, 2.
5. What shall be considered a legal arrest and imprisonment, so as to constitute an act of bankruptcy, See BANKRUPT, 6.

### ASSAULT AND BATTERY.

See EVIDENCE, 1.

### ASSIGNMENT.

See BANKRUPT, 5. COSTS—security for, 5. PARTNERSHIP, 3.

*A.* deposits goods with *B.* for sale, and then assigns his property to trustees for his creditors; the trustees, at *B.*'s request, pay the duties on the goods, which, when sold, do not produce sufficient to repay them:—*Held*, that the trustees are entitled to recover the money advanced by them, together with the proceeds of the goods; though *A.* had, before the assignment, agreed that they should go in liquidation of a claim which *B.* had upon him. *Livesey and others v. Willis*, *E. 54 G. 3.* 130

### ASSUMPSIT.

*See* AGENT. AGREEMENT, 2.

ASSIGNMENT. BAIL, 1.

BANKRUPT, 2. CARRIER.

FORGED INSTRUMENT.

LANDLORD AND TENANT, 2.

PARTNERSHIP, 2, 3.

VENDOR AND VENDEE, 2, 4, 5, 6, 8, 11, 12, 13.

1. A debt incurred in foreign coin is recoverable as for lawful money of Great Britain. *Harrington and others v. Macmorris*, *M. 54 G. 3.* 33
2. Assumpsit lies to recover the balance of a banker's account, however voluminous it may be; and the plaintiff in such case is not obliged to bring account. *Tomkins v. Wiltshire*, *E. 54 G. 3.* 115
3. When a person contracts to build a house, he is not entitled to recover for the materials, on the count for goods sold and delivered. *Cottrell v. Apsey*, *T. 55 G. 3.* 581
4. An agreement having existed between the successive vicars and churchwardens of a parish, that certain fees should be taken upon the burial of strangers in the churchyard, and divided equally between them; the incoming vicar refuses to accede to that agreement, and prevails on the collector of the fees to

pay over to him the whole of what he then has in his hands:—*Held*, that the collector having received one half of these fees to the use of the churchwardens, they are entitled to recover that moiety from the vicar, in an action for money had and received. *Littlewood v. Williams, clerk*, *T. 55 G. 3.* 589

### ATTACHMENT.

*See* ARBITRATION, 1, 2, 8.

SHERIFF, 2, 4.

WITNESS, 2, 3, 4.

### ATTORNEY.

*See* ANNUITY, 2.

COSTS, 2.

*A.*, an attorney, at the request of *B.*, who is in custody for debt in an action in which *A.* has not been concerned, gives an undertaking for the debt and costs, which he accordingly pays to the plaintiff's attorney, without having the costs taxed.—*Held*, that this was not a disbursement by *A.* as an attorney, within the meaning of 2 Geo. 2. c. 23. s. 23 *Prothero v. Thomas*, *E. 55 G. 3.* 539

### AUCTION AND AUCTIONEER.

*See* VENDOR AND VENDEE, 4, 6, 7, 11, 12, 13.

### AUDITA QUERELA.

*See* PRACTICE, 4.

### AVOWRY.

*See* COSTS, 3.

REFLEVIN, 2, 4.

### AWARD.

*See* ARBITRATION.

STAMP, 3.

### BAIL.

1. Where bail are fixed with the

- debt, if one of them, having paid it, bring his action against his co-bail, for contribution, he must prove the judgment as well as the execution. *Beldon v. Tankard*, *M.* 54 G. 3. 6
2. The court will set aside the proceedings against bail, on the ground of the plaintiff having accepted a *cognovit* from the defendant in the original action; the last instalment of which would become due on a day subsequent to that on which the plaintiff would have been entitled to judgment and execution, had he gone to trial in the original cause. *Crofts v. Johnson*, *H.* 54 G. 3. 59
3. *A.* is arrested and held to bail in a civil action, after which an extent issues against him at the suit of the crown, and he is thereupon committed to the custody of the sheriff of London. On an application to the court by the bail for relief, — *Held*, 1st, that the bail were not entitled to enter an exoneretur on the bail piece; 2dly, the crown having refused its consent to the defendant being surrendered, unless he should be immediately remanded to the custody of the marshal; that this court would have no authority so to remand him, after he had been surrendered to the warden of the Fleet; and 3dly, that the bail could not surrender the defendant by *habeas corpus*, as a matter of right, without the consent of the crown: — But the court expressed their readiness to give the bail time for surrendering the defendant. *Hodgson v. Temple*, *E.* 54 G. 3. 166
- It is no ground for setting aside execution which has been signed against bail, that the plaintiff has accepted a composition from the defendant, and suspended the execution of a *ca. sa.* which had been issued against him; though it were without the knowledge or consent of the bail. *Brickwood v. Annis*, *T.* 54 G. 3. 250
5. Where a writ of error is sued out before final judgment, the four days for putting in bail in error are to be reckoned from the time when the taxation of costs is completed by the insertion of the sum. *Blackburn v. Kymer*, *T.* 54 G. 3. 278
6. Notice of bail given on the 10th November; on the 12th, notice that other bail would be added, who would justify on the 15th; — on the 14th, the latter notice countermanded, and notice again given of the original bail: They appearing to justify on the 15th; — *Held*, that the last notice would have been sufficient, had notice of justification been given. — *v. Marshall*, *M.* 55 G. 3. 322
7. Bail by affidavit rejected on the ground that one of them was described in the notice of justification as *A. B.* generally, but in the affidavit of justification as *A. B.* the younger. — *v. Meller*, *M.* 55 G. 3. 386
8. Where bail above are put in but not justified; and the sheriff, being fixed, brings an action on the bail-bond, to which the defendant pleads, *comperuit ad diem*; the court will, on motion by the sheriff, order the recognizance of bail in the original action to be struck off the file; though the defendant allege that the sheriff was fixed through his own negligence; for that should be the subject of motion to stay the proceedings on the bail-bond. *Leigh, Esq. and another, v. Bertles*, *E.* 55 G. 3. 520

## BAILMENT.

See ASSIGNMENT. BANKRUPT, 2.  
VENDOR AND VENDEE, 10.

8. *A.* being indebted to *B.* for different usurious loans, applies to *B.* for a further advance, which *B.* agrees to make, at the legal rate of interest, provided *A.*'s father will give his security for it, and also for part of the previous debt. *A.*'s father consents, and accepts three bills, the two first of which exactly cover the legal debt. The first is paid when due. In an action on the second;—*Held*, that the acceptances, having been given partly as a security for an illegal debt, were all tainted with the illegality, and were therefore void. *Harrison v. Hannel*, *M.* 55 G. 3. 349
9. The interest in a policy of insurance declared to be on a bill of exchange, drawn for the use of the ship; *See* INSURANCE, 14.
10. Two *British* subjects, *A.* and *B.*, being detained prisoners in *France*, *A.* draws bills payable to *B.* on another *British* subject resident in *England*, which *B.* indorses to *C.*, an alien enemy.—*Held*, that on the return of peace, *C.* is entitled to recover the amount of the bills from the acceptor. *Antoine v. Morshead*, *T.* 55 G. 3. 558
11. The payee of a bill of exchange, having, before it became due, presented it for acceptance, which was refused, passes it to the plaintiff for value, without giving notice either to the drawer, or to the plaintiff, of the dishonour; the plaintiff presents it, and it is again refused acceptance, of which the drawer receives due notice:—*Held*, that the neglect of the payee to give notice to the drawer of the first refusal, was no discharge to him of his liability to the plaintiff. *O'Keefe v. Dunn*, *T.* 55 G. 3. 613
1. Indorsee liable for freight. *See* FREIGHT, 1.
2. Goods carried from a port in *Scotland* to a port in *England* are not to be considered as exported, so as to make it necessary to have the bill of lading stamped. *Scotland v. Wilson and another*, *E.* 54 G. 3. 204
3. *A.* deposits goods with *B.* as a security for money advanced by *B.*, with a promise to deliver the bill of lading when it should arrive, indorsed to *B.* *C.* is employed as a broker to dispose of the goods for *B.*'s benefit. Before the bill of lading arrives, the goods are attached in the mayor's court in the hands of *C.* by a creditor of *A.* *Held*, that the transfer of the property to *B.* was complete, though the bill of lading had never been indorsed, and that therefore the foreign attachment was no answer to an action by *B.* against *C.* for the proceeds. *Giles and another, v. Nathan and another*, *E.* 54 G. 3. 225

### BOND.

1. For pleading in debt on bond;—*See* PLEADING, 2, 3, 5, 6.
2. Where the insertion of a word in the condition made a variance between the oyer and the condition, but did not avoid the instrument; *See* DEBT ON BOND.

### BROKER.

*See* AGENT.

### CARRIER.

An agreement that, in consideration that *A.* would take on board his ship *B.*'s goods, for the purpose of conveyance, *B.* would pay a certain sum on *A.*'s delivering to him the bills of lading, is a valid contract; and the price of the carriage of the goods is recoverable immediately on the loading them, whe-

### BILLS OF LADING.

*See* CARRIER.

CONSIGNMENT.

ther the voyage be performed or not. *Andrew v. Moorhouse, E. 54 G. 3.* 122

### CERTIFICATE.

1. Of a judge, to entitle the defendant to costs. *See* AMENDMENT, 6.
2. Of justices, for turning a road. *See* JUSTICES OF PEACE.
3. Of a bishop for non-residence. *See* NON-RESIDENCE.

### CHARTER-PARTY.

*See* AGREEMENT, 2.  
COVENANT, 3.  
EVIDENCE, 12.

### CHURCHWARDENS.

*See* ASSUMPSIT, 4.

### COGNOVIT.

1. A cognovit, accepted by the holder of a bill of exchange, no discharge of the acceptor. *See* BILLS OF EXCHANGE, 1.
2. When a cognovit, accepted by the plaintiff from the defendant, is a discharge of the bail. *See* BAIL, 2.

### COMMISSION.

*See* AGREEMENT, 2.

*A.* commissions *B.* to sell a ship for him, which is accordingly put up to sale, but bought in. *Held*, that *B.* is not entitled to a commission on the sale of her. *Mestaer and another, assignees of Lawrence Williams, a bankrupt, v. Atkins and another, H. 54 G. 3.* 76

### COMPOSITION,

Between the plaintiff and defendant, no ground for setting aside execution against the bail. *See* BAIL, 4.

### COMMON.

copyholder, having a right of common in two manors, and hav-

ing received an allotment out of one, in lieu of his right in that manor, is entitled to his full allotment out of the other, when inclosed, whether the manors be held under the same, or under different lords. And though the estate, in respect of which he claims, be partly enfranchised freehold, that does not extinguish his right as to the part enfranchised. *Barwick v. Matthews, H. 54 G. 3.* 50

### CONCEALMENT,

*See* INSURANCE, 5, 6.

### CONDEMNATION.

*See* INSURANCE, 2, 3, 11.

### CONDITION.

1. Of an acceptance of a bill of exchange. *See* BILLS OF EXCHANGE, 5.
2. Of a bond;—for variance between it, and the oyer. *See* DEBT ON BOND.

### CONSIGNMENT.

*See* FREIGHT.

1. *A.* consigns goods to *B.*, abroad, and orders a cargo in return, for which he sends his own ship. The return cargo is delivered to *A.*'s captain, *B.*, stating it to be on *A.*'s account, as *A.*'s own goods, and to be delivered to *A.* The return cargo consisting of more goods than the proceeds of those consigned to *B.*, *B.* draws bills on *A.* for the difference, which he sends to his agent, with a bill of lading drawn in blank, and desiring the agent, in case of *A.*'s refusal to accept the bills, to indorse the bill of lading to *C.* *A.* refuses to accept the bills, and the bill of

lading is accordingly indorsed to C. The ship arrives, and C. demands the cargo, as indorsee of the bill of lading; the captain, however, refuses, and delivers them to A., who deposits them with D., as his warehouse-man. D. then receives notice from B. to hold the goods for B. as his property; in consequence of which D. refuses to re-deliver them to A. In an action of trover by A. against D.:—Held 1st, that D. was not estopped, by having received the goods as the warehouseman of A., from setting up the claim of a third person as a defence, supposing that claim to be a good one:

2dly, That A., having rested his claim on the supposition that the property had vested in him, could not, if he failed in that point, set up his lien on the goods for freight:—But,

3dly, That, though the goods might have been delivered to the captain, on condition of A.'s accepting the bills, yet, that, as no such condition was imposed at the time of the delivery, that delivery was complete, and vested the property absolutely in A. *Ogle v. Atkinson and another*, M. 55 G. 3. 323

## CONTRACT.

See AGREEMENT.

VENDOR AND VENDEE.

## CONTRIBUTION.

See BAIL, 1.

## COPYHOLDER.

See COMMON.

## COSTS.

See AMENDMENT, 6.  
ATTORNEY.

BANKRUPT, 4.

INSURANCE, 1.

PRACTICE, 9.

1. When a man sues as executor, the court will require a strong case against him, to subject him to costs within the meaning of the stat. 43 Geo. 3. c. 46. s. 3. *Foulkes and another, executors, &c. v. Neighbour*, M. 54 G. 3. 21

2. If the plaintiff and defendant conclusively settle the debt and costs upon an execution, in order to defraud the plaintiff's attorney of his costs, the plaintiff's attorney cannot sue out a second execution on the same judgment to levy his costs, but must apply to the court. *Graves v. Eudes*, E. 54 G. 3. 113

3. The defendant in replevin avows for rent in arrear, and that the goods had been clandestinely removed: The plaintiff pleads, 1st, *non-tenure*; 2dly, no rent in arrear; and 3dly, that the goods were not clandestinely removed. The last issue only being found for the plaintiff: Held, that the defendant was entitled to deduct from the plaintiff's costs the costs of the two first issues which were found for the defendant. *Cook v. Green*, E. 54 G. 3. 234

4. A., abroad, furnishes goods to B. at the request of C., who draws bills on B., payable to A., which C. refuses to accept. A. sends for a witness from abroad for the support of an action against B., pending which action C. arrives in this country. A. then discontinues his action against B., and commences another against C., in which he recovers by means of the witness he had brought from abroad:—Held, that C. is only liable for the costs of the witness while detained in this country, and not for those of bringing him over, or of sending him back. *Tremain and another v. Barrett*, H. 55 G. 3. 463

5. But where a witness is sent for from abroad *bonâ fide* for the pur-

pose of the cause, and for no other; it is in the discretion of the prothonotary to allow the plaintiff the costs of bringing him over and of sending him back, though he should have been sent for, and have arrived, before the commencement of the action. *Ibid*, and *See Tremain v. Faith*, T. 55 G. 3. 563

6. Where the defendant pays money into court, and the plaintiff proceeds, and suffers the defendant to sign judgment of *non pros.* against him, he shall not afterwards be entitled to his costs, up to the time of paying the money into court. *Postle v. Beckington*, E. 55 G. 3. 510

### COSTS—SECURITY FOR.

1. The court will not oblige an infant plaintiff to give security for costs. *Anonymous*, M. 54 G. 3. 4
2. On moving for a rule *nisi*, the defendant must state in what stage the proceedings are. *Luzalletti v. Powell*, M. 55 G. 3. 376
3. And the court will not grant it, where interlocutory judgment has been signed, until that judgment is set aside. *Ibid*.
4. Nor will the court enter into the merits of the case, nor grant the rule on account of the hardship of the case upon the defendant. *Cirragno v. Hassan*, H. 55 G. 3. 421
5. Nor require an insolvent debtor to give security, who, having assigned his property under the insolvent acts, brings an action for a debt incurred before the assignment;—the assignees having refused to sue. *Townsend v. Snow*, E. 55 G. 3. 477

### COVENANT.

*See* BANKRUPT, 5.

PARTNERSHIP, 3.

1. On a covenant for further assurance, where the breach happened in the time of the covenantee, but the damage accrued to the heir; the heir has a preferable title to the executor, to bring the action of covenant. *King v. Jones*, E. 54 G. 3. 107
2. A. covenants with B. to serve him for certain wages for 3 years, at the end of which time a balance remains due to him from B. A. then enters into a fresh contract under seal, to serve B. at increased wages; and at the end of three years more, it appears that he has received, at different times, sums more than sufficient to cover the balance due on the former contract:—*Held*, that the last mentioned sums having been paid *generally*, without specifying on what account, A. had a right to apply to them to the satisfaction of the simple contract debt. *Peters v. Anderson*, E. 54 G. 3. 238
3. By charter-party, the freighter covenants with the owner to ship a cargo at *Oporto*, and to dispatch the ship with the first convoy for *England*, within fourteen working days after she is ready to receive her cargo: It is also agreed, that the freighter may detain the ship for loading, fifteen running days after the fourteen, paying for the fifteen at a certain rate. The first convoy sails after the expiration of the 14 days, and before the end of the 15.—*Held*, that the covenant to sail with the first convoy is restricted by the agreement for the fifteen days; and therefore, that the defendant is not liable to pay for the detention after the fifteen days. *Connor v. Smith*, T. 54 G. 3. 276
4. The plaintiff demises a public-house to the defendant:—the defendant to take all his malt of the



plaintiff; the plaintiff, upon every reasonable request, to deliver good malt, and if he did not, the defendant to be at liberty to buy it of any other:—*Breach*, that the defendant used a quantity of malt, not bought of the plaintiff, and without requiring the plaintiff to deliver such;—*Plea*, that the plaintiff had delivered bad malt to the defendant, who thereupon bought malt of others.—*Held*, that the plea was bad; for as one failure by the plaintiff would not operate as a total suspension of the covenant, the defendant should have alleged a request to send him good malt; and that he had purchased the malt of others, on the plaintiff's failure to do so. *Weaver v. Sessions*, E. 55 G. 3. 505

## COURT OF REQUESTS.

See JURISDICTION.

## DAMAGES.

See AMENDMENT, 2, 3.  
TRESPASS.

## DEBT.—On Bond.

See PLEADING, 2, 3, 5, 6.

1. To an action of debt on bond, the defendant prayed oyer of the condition, which was for the payment of 100*l.* by instalments, till the said sum of one "*hundred pounds*," be paid, and then pleaded *non est factum*. The word *hundred* had been omitted in the second place where it occurs in the condition, and was afterwards inserted without the defendant's knowledge.—*Held*, that this was a variance between the oyer and the condition, which precluded the plaintiff from recovering. *Waugh and others, administrators of Phillips, v. Russell*, E. 54 G. 3. 214.

2. But the alteration itself was immaterial, and did not avoid the instrument. *Ibid.*, and see also, M. 55 G. 3. 311

## DECLARATION.

See ACTION ON THE CASE, 1.  
AMENDMENT, 14, 16.  
EVIDENCE, 8.  
PENAL ACTION, 3.  
PRACTICE, 5, 8, 12, 14.  
PROCESS, 1.

## DELIVERY.

See EVIDENCE, 8.

What shall not be considered a complete sale and delivery. See VENDOR AND VENDEE, 1, 3.

## DEMURRAGE.

See COVENANT, 3.

## DEPOSIT.

See VENDOR AND VENDEE, 4, 6, 7, 10, 11, 13.

## DEVIATION.

See INSURANCE, 7, 8.

## DEVISE.

1. A. devises all the rest, residue, &c. of his estate, of *whatsoever nature or kind the same might be*, and of which he might be possessed or interested in at the time of his decease, to trustees, to put and place out the same in some public or private funds, on good and sufficient security, with power to call in, remove, or new place out the same, and to receive the annual interest or produce thereof for ten years after his decease, in trust to place out the same annually in like manner, so that the interest might become a principal sum, and at the end of ten years to

- apply the annual interest of the whole of such principal money in the erection of a free-school, to be under the management of the trustees, and their heirs; but the annual interest only to be so applied. *Held*, that if the real estate passed at all under this will, it was, at all events, only for ten years. *Newland v. Majoribanks, and others, M. 54 G. 3.* -44
2. *A.* devised all his messuages, tenements, lands, &c. in *T.*, and then in his own occupation, to *B.* for five hundred years, upon certain trusts; after the determination of which term, and subject thereto, he devised all his said messuages, &c. so situate, to *C.*; and in case of *C.*'s death, he devised the said last-mentioned hereditaments and premises over. He also bequeathed to *C.* the stock, crops, &c. which at his death should be upon the said estate and premises at *T.*, then in his own occupation.—*Held*, that those premises only passed by the will, either to *B.* or *C.*, which were in the testator's own occupation, at the time of making his will. *Doe, on the demise of Christopher Parkin and James Wilkinson, v. Joseph Parkin, H. 54 G. 3.* 61
3. *A.* devises a copyhold estate to trustees for the use of *B.* for her life; then to such uses as *B.*, by her last will, should appoint; and in default of such appointment to the right heirs of *B.*—*A.* dies; the trustees are admitted in fee, on the trusts declared by the will. *B.*, by an appointment in form of a deed poll, in nature of a will, irrevocably devises all her interest in the premises to *C.*; and declares that no subsequent will should revoke this disposition: the premises are surrendered to the use of *C.* in reversion, and he is admitted accordingly. *B.*, by another will, afterwards devises the premises to *D.* and his heirs, so as not to be subject to any of her debts, contracts, or engagements: Under this will *D.* was admitted, and soon afterwards *B.* died. *Held*, that by the devise to *D.*, the former appointment in favour of *C.* was revoked, and the legal estate divested out of the trustees under *A.*'s will and vested in *D.*; and that a surrender to *D.* by the trustees was as effectual as if it had been made by *B.*—*Doe, on the demise of Woodcock, v. Barthrop, H. 54 G. 3.* 90
4. *A.* devises to his brother *B.* all his real and personal estate, subject to subsequent devises and legacies;—then, part of his lands to *B.*'s son, *C.* and his heirs for ever; then if *B.* and *C.* should die, having no issue of either of their bodies, all his real estate to *D.*—*A.* dies, and *B.* and *C.* levy a fine of the premises bequeathed to *C.*, to the use of themselves, their heirs and assigns for ever; and *C.* suffers a recovery of the same premises to his own use.—*B.* dies in 1760, having had no other issue but *C.*—*C.* dies in 1779, never having had any issue.—*D.* dies in 1785, neither he, nor any one claiming under him, having ever had possession of the premises.—*Held*, 1st, that the devise over to *D.* was not an executory devise, but a remainder, limited after successive estates tail of *C.*, and of *B.* by implication:—2dly, supposing it to have been an executory devise, contingent on *B.* and *C.* dying, having no issue, &c.; *semble*, that that event had not happened:—3dly, *semble*, that *D.* or his heirs could not have had a writ of intrusion, supposing the right to have been in *D.*—4thly, if he could, *quære* whether he would

not have been barred by the statute of limitations, or by the fine levied by B. and C. *Sir Samuel Romilly, Knight, v. James, T.* 55 G. 3. 592

## DISSOLUTION OF PARTNERSHIP.

See PARTNERSHIP, 2, 3.

## DISTRESS.

See REPLEVIN.

## DISTRINGAS.

1. On motion for leave to issue a *distringas*, under stat. 51 Geo. 3. c. 124, the party moving must swear that he believes that the defendant absconds to avoid being served with process; and also his reason for such belief. *Down v. Crewe, T.* 54 G. 3. 267
2. The court will not grant a *distringas*, to compel an appearance, on the ground that the defendant is out of the kingdom. *Jordan v. Bell, M.* 55. G. 3. 292

## EJECTMENT.

See WITNESS, 1.

## ERROR.

1. Writ of, to reverse an outlawry. See EVIDENCE, 4.
2. Bail in error. See BAIL, 5.

## EVIDENCE.

See ACTION ON THE CASE, 1.

BAIL, 1.

BILLS OF EXCHANGE, 2.

LANDLORD AND TENANT, 4.

WITNESS, 1.

1. An action for a malicious prosecution, in indicting the plaintiff for an assault and battery, where the bill has not been found, cannot be

supported without evidence of express malice, as well as of the want of probable cause. *Byne v. Moore, M.* 54 G. 3. 12

2. The particular of the defendant's set off is not admissible evidence of the existence of a debt from the defendant to the plaintiff. *Harrington and others, v. Macmorris, M.* 54 G. 3. 33
3. Condemnation of a neutral, evidence of her having been engaged in some illegal transaction. See INSURANCE, 2.
4. On a writ of error to reverse an outlawry, on the ground "that the outlaw, before and at the time of suing out the writ of *exigent*, and from thence until the time of pronouncing the outlawry, was in parts beyond the seas;" the plaintiff in error having proved the previous proceedings in the outlawry, and that the outlaw, at the time of suing out the *exigent*, was abroad, and died abroad, but without fixing the time of his death:—*Held*, that it was not necessary to prove the time when the judgment of outlawry was pronounced. *Richardson and another, executors, v. Robertson, H.* 54 G. 3. 58
5. In a writ of right, 40 years undisturbed possession is sufficient to rebut presumptive evidence of a seisin in fee in the person under whom the demandant claims; or, at least, from which to presume a conveyance of the premises to the tenant. *Byne v. Price, H.* 54 G. 3. 68
6. In an action against a magistrate for a malicious conviction, it is not sufficient for the plaintiff to shew that he was innocent of the offence of which he was convicted; but he must also prove, from what passed before the magistrate, that there was a want of probable cause. *Burley v. Bethune, E.* 54 G. 3. 220

7. On a question whether a creek be a public navigable river or not, instances of persons going up it, for the purpose of cutting reeds, and on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are evidence sufficient for the jury to presume it a public river. *Miles v. Rose and others*, M. 55 G. 3. 913
8. In an action for not delivering goods according to agreement, after demand made, it is not necessary to adduce evidence in support of the averment, that the plaintiff was ready and willing to accept and pay for the goods. *Wilks v. Atkinson*, H. 55 G. 3. 412
9. Of the evidence necessary to connect the declaration with the writ in a penal action, in order to shew that the declaration was filed in time; See PENAL ACTION, 4.
10. *Semb.*, that in an action for the penalties given by the 9 Ann. c. 14. s. 2. a bill of discovery filed against the defendant for the purpose of a former action on the former part of the second section, for the money lost, may be given in evidence. *Thislewood qui tam, v. Cracraft and D'Arley*, E. 55 G. 3. 497
11. What evidence not sufficient to connect the sheriff with his officer. See SHERIFF, 6.
12. Where an instrument is executed by two parties, each keeping one part; if one be lost, the court will not compel the other party to produce his part, in order to support an action against him on the instrument. *Street v. Brown*, T. 55 G. 3. 610

## EXECUTION.

See BAIL, 4. BANKRUPT, 4.  
COSTS, 2. SHERIFF.

1. An outgoing tenant having agreed

to assign the remainder of his term to the incoming tenant, the sheriff, before an actual assignment made, may, under an execution against the outgoing tenant, sell his interest in such remaining term, and set upon it the same value that the incoming tenant had agreed to give for it. *Sparrow v. the Earl of Bristol*, M. 54 G. 3. 10

2. Where the sheriff, by virtue of a writ of *test. fi. fa.*, entered the plaintiff's house, sold his goods by auction against the plaintiff's will, and kept possession till after the return of the writ; *held*, that this was but one continued trespass. *Aikinhead v. Blades and others*, M. 54 G. 3. 17
3. Return of a writ of *fi. fa.* amended; See AMENDMENT, 4.
4. Execution against bail not set aside, on the ground that the plaintiff had accepted a composition from the defendant; See BAIL, 4.
5. Sheriff's return to a writ of *venditioni exponas* amended; See AMENDMENT, 5.

## EXECUTOR.

See AMENDMENT, 3.  
COSTS, 1.  
PRACTICE, 10.

1. Where the heir has a preferable title to the executor to bring an action of covenant. See COVENANT, 1.
2. To an action against an executor for goods sold to the testator, the defendant, at *nisi prius*, pleads a plea *puis darrein continuance* of judgment recovered in a plea of debt on the simple contract of the testator, commenced since the present action.—On demurrer, *held*, 1st, that it was no answer to this plea, that the judgment pleaded was in a plea of debt on the testator's simple contract; and 2dly, that the

plea was not invalidated by the defendant having suffered judgment to pass against him voluntarily. *Prince v. Nicholson*, T. 54 G. 3. 280

### EXPORT.

See *BILLS OF LADING*, 2.

### FINES.

See *AMENDMENT*, 1, 8, 9, 10, 11, 12, 15.

1. The court will allow a fine *sur concessit*, for conveying a life estate, and a fine *sur cognizance de droit tantum*, for conveying a reversionary interest, in the same premises, to pass as one and the same fine. *Prideaux and another v. Gifford and wife, deforciant*, H. 55 G. 3. 422
2. Fine allowed to pass, by a copy of the copy of the præcipe and concord, left with the judge;—the original having been lost. *George Ellis, plaintiff, and Benjamin Johnson and wife, deforciant*, T. 55 G. 3. 553

### FISHERY.

A stream of water running by the side of a piece of ground, which is enclosed on every side, except that on which it is bounded by the water, is not a *stream in inclosed ground*, within the meaning of 5 Geo. 3. c. 14. s. 3., so as to subject a person fishing therein to the penalty inflicted by that act. *Lisle v. Brown*, E. 54 G. 3. 127

### FOREIGN ATTACHMENT.

See *BILLS OF LADING*, 3.

1. It is no ground for impeaching the regularity of a foreign attachment, that the debt was contracted, or the parties resided abroad. *Harington v. Macmorris*, M. 54 G. 3. 33

2. *A.* proceeds by foreign attachment against *B.*, who surrenders, and pleads to the jurisdiction of the court. *A.* discontinues the foreign attachment, and arrests *B.* by process out of this court:—*Held*, that the foreign attachment was not such an arrest as to entitle *B.* to be discharged out of custody in the present suit, on entering a common appearance. *Wood and others, v. Thomson*, M. 55 G. 3. 395

### FORGED INSTRUMENT.

1. *A.* having a navy bill which purports to be for 1800*l.*, pays it to *B.* for that sum; *B.* passes it to *C.*, who presents it at the navy-office for payment, when, it appearing that it was originally drawn for 800*l.* only, and that the sum had been fraudulently altered to 1800*l.*, the navy-office detain the bill, issuing a fresh one for 800*l.*; *C.* demands and receives of *B.* the remaining 1000*l.*—*Held*, that *B.* is entitled to recover the 1000*l.* from *A.*, though all the parties were equally ignorant of the fraud.—*Jones and others, v. Ryde and another*, E. 54 G. 3. 157
2. So, though the full apparent amount of the bill should have been paid by the office, on presentment. *Bruce v. Bruce, and others*, E. 54 G. 3. 165
3. A bill of exchange with a forged acceptance, purporting to be payable at the house of *A.* and *Co.*, bankers, in *London*, with whom the supposed acceptor keeps cash, is indorsed to *B.* for a valuable consideration. *B.* indorses it to his agent in *London*, who presents it on the 23d of *April* at the house of *A.* and *Co.* for payment. *A.* and *Co.* pay it, and send it on the 30th of *April* to the supposed acceptor, who dis-

avows it. *A. and Co.* immediately give notice of the forgery to *B.*, and demand repayment, which *B.* refuses. All parties are ignorant of the fraud.—*Held*, that *A. and Co.*, by paying the bill without ascertaining that the acceptance was genuine, were precluded from recovering the amount from *B. Smith and others, v. Mercer and another, H. 55 G. 3. 453*

### FRAUD.

See AGREEMENT, 2, 3.  
BANKRUPT, 1, 3.  
BILLS OF EXCHANGE, 8.  
COSTS, 2.  
FORGED INSTRUMENT.  
INSURANCE, 2, 3.  
VENDOR AND VENDEE, 2.

### FREEHOLD.

Enfranchisement of lands not an extinguishment of right of common.  
See COMMON.

### FREIGHT.

See CARRIER.  
CONSIGNMENT, 2.  
INSURANCE, 9, 12.  
PARTNERSHIP, 2.

1. The indorsee of a bill of lading, which directs the goods to be delivered to order or to assigns, paying freight, is liable for the freight, though he be only acting as broker for the consignee; and though 12 months have elapsed since the landing of the goods, without any demand of freight, he is bound not to deliver the goods, till he knows that freight has been paid. *Bell and others, v. Kymer M'Taggart, and others, E. 54 G. 3. 146*
2. *A.* consigns goods to *B.*, with directions to pay over the net proceeds to *C.* *B.* employs *D.* to dispose of them. In an action by *C.*

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to recover the proceeds from *D.*, *D.* is entitled to make the same deductions for freight, &c. as *B.*, who was the owner of the ship in which the goods were brought, might have made. *Blackburn v. Kymer and others, E. 54 G. 3. 223*

### GAME LAWS.

*A.* being convicted of sporting contrary to the game laws, is required to bring his dog to a magistrate; who orders it to be immediately shot: *Held*, that the magistrate was justified under the 5 Ann. c. 14. s. 4. *Kingsnorth v. Bretton, and another, E. 54 G. 3. 106*

### HEIR.

Where the heir has a preferable title to the executor, to bring an action of covenant. See COVENANT, 1.

### HIGHWAY.

See ACTION ON THE CASE, 2.  
JUSTICES OF PEACE.

### ILLEGALITY.

See AGREEMENT, 2, 3.  
BILLS OF EXCHANGE, 8, 10.  
INSURANCE, 2, 3, 14.  
VENDOR AND VENDEE, 2.

### IMPARLANCE.

See PRACTICE, 15.

### IMPRISONMENT.

What is a legal imprisonment so as to constitute an act of bankruptcy.  
See BANKRUPT, 6.

### INCLOSURE.

See COMMON.  
FISHERY.

### INDICTMENT.

See EVIDENCE, 1.

proceeding on her voyage, on the 9th of September, with a prospect of favourable weather; but was obliged by contrary winds to come to an anchor near the mouth of the harbour, where she was detained till after the 15th. *Held*, that though this would have been a compliance with a warranty to sail by such a day, this warranty being to depart, which could only mean from the port of *Memel*, had not been complied with. *Moir v. The Royal Exchange Assurance*, T. 55 G. 3. 370

### INTEREST.—IN LAND.

What interest in a term of years may be taken in execution. *See* EXECUTION, 1.

### INTEREST.—IN THE THING INSURED.

1. Declaration of, in a policy. *See* INSURANCE, 4, 14.
2. Averment of, in the declaration. *See* INSURANCE, 10.

### IRREGULARITY.

*See* PRACTICE.

### ISSUE,

COSTS OF;—*See* COSTS, 3.

### JOINDER, IN ACTION.

*See* ACTION ON THE CASE, 2.  
PARTNERSHIP, 1, 2.  
PRACTICE, 5.

### JUDGMENT.

*See* AMENDMENT, 2, 3, 6.

BAIL, 1, 2.

BANKRUPT, 4

COSTS, 2, 6.

COSTS—SECURITY FOR, 3.

EVIDENCE, 4.

EXECUTOR, 3.

INFANT, 3.

PLEADING, 4, 6.

PRACTICE, 4, 6, 8, 10, 12, 14

REFLEVIN, 4.

### JURISDICTION.

*See* GAME LAWS.

A person renting a counting-house in the city of *London*, jointly with another person, and receiving orders there for his business, is within the jurisdiction of the court of requests for the city of *London*, though he sleep and reside in *Southwark*. *Croft v. Pitman*, T. 54 G. 3. 269

### JUSTICES OF PEACE.

*See* GAME LAWS.

EVIDENCE, 6.

1. Where an order of justices for the diversion and turning of a road, recites that they had viewed the new road, and found it to be in good condition and repair;—*Held* to be a sufficient certificate thereof, under stat. 13 G. 3. c. 78. s. 19. *De Ponthieu v. Pennyfeather*, T. 54 G. 3. 261
2. If the certificate be deposited with the clerk of the peace, that is an inrolment of it within the same section. *ibid.*
3. Where a road is stopped up by order of justices, and a new one is substituted, partly over the ground of a stranger, and partly over an accustomed road, that is a sufficient compliance with the act, provided the new road convey the public to the same place as the old one did. *ibid.*

### LANDLORD AND TENANT.

*See* BANKRUPT, 5.

COVENANT, 4.

EXECUTION, 1.

WITNESS, 1.

1. Where a tenant by mistake, or misrepresentation, pays rent to a

person not entitled to demand it, he is not precluded by such payment from giving evidence on a plea of *non tenuit* in replevin against the supposed landlord, to shew that the latter is not intitled to the rent.

*Rogers v. Putcher*, E. 55 G. 3. 541

2. A declaration that in consideration that the defendant *had* become tenant to the plaintiff of a farm, the defendant undertook to make a certain quantity of fallow, and to spend 60*l.* worth of manure every year thereon, and to keep the buildings in repair.—*Held* bad on general demurrer; those obligations not arising out of the bare relation of landlord and tenant.—*Brown v. Crump*, T. 55 G. 3. 567

#### **LIBEL.**

See PLEADING, 7.

#### **LICENCE.**

See AGREEMENT, 2.

INSURANCE, 3.

NON-RESIDENCE,

#### **LIEN.**

See CONSIGNMENT, 2,

FREIGHT.

- A. commissions B. to sell a ship for him, and having deposited her register with him for that purpose, becomes bankrupt.—*Held*, that B. has a lien on the register against the assignees of A. for the amount of his demand against A., consisting partly of charges incurred on the ship's account, and partly of other charges; and that this was not such a transfer of the property as to bring the case within the meaning of the register acts. *Mes-  
taer and another, assignees of Lawrence Williams, a bankrupt, v. Atkins and another*, H. 54 G. 3. 76

#### **LIMITATION.**

1. Of actions, See ACTION ON THE CASE, 3, 4.—PENAL ACTION, 3, 4.

2. Of the time for moving to set aside an award, See ARBITRATION, 6.

#### **LONDON, COURT OF REQUESTS.**

See JURISDICTION.

#### **MAGISTRATE.**

See JUSTICES OF PEACE.

#### **MALICIOUS ARREST.**

See COSTS, 1.

#### **MALICIOUS CONVICTION.**

See EVIDENCE, 6.

#### **MALICIOUS PROSECUTION.**

See EVIDENCE, 1.

#### **MANOR.**

See COMMON.

#### **MEMORIAL—OF AN ANNUITY.**

See ANNUITY.

#### **MISNOMER.**

See PRACTICE, 12, 13.

SHERIFF, 2.

#### **NEUTRAL VESSEL.**

See INSURANCE, 2, 3.

#### **NISI PRIUS.**

That a plea *puis darrein continuance* may be pleaded at *nisi prius*, See PRACTICE, 1, 2.

#### **NON-RESIDENCE.**

1. The incumbent of two livings, A. and B., obtains a licence from his bishop to reside out of the parish of A., there being no parsonage-house thereon, on condition of his residing at a short distance, and actually performing the duties.—*Held*, that this is not such a residence at A. as to excuse him from residing at B. without another licence for that



- purpose. *Wright v. Flamank, clerk, M. 55 G. 3.* 368
2. Where a licence for non-residence has been obtained, previously to the 14th July, 1814, pursuant to 54 G. 3. c. 54; but the allowance by the archbishop, required by 43 G. 3. c. 84. s. 20., is not obtained till after that period;—the licence, when ratified, is valid from the time when it was originally granted. *Wright v. Lamb, clerk, M. 55 G. 3.* 372
3. Though a licence for non-residence do not cover the whole of the period for which penalties are sought to be recovered, yet, if there be not sufficient time left uncovered to subject the incumbent to a penalty, the court will interfere to stay the proceedings. *Wynn v. Kay, M. 55 G. 2.* 387
4. The stat. 54 G. 3. c. 54. which requires licences to be granted on or before the 1st July, 1814, does not limit the time within which certificates are to be granted. *Ibid.*
5. *Semble*, that a certificate granted after the 1st July, 1814, cannot be pleaded in bar to the action; but is only available by application to the court to stay the proceedings. *ibid.*
6. The incumbent of two livings, one of which has a house of residence upon it, and the other not, may reside on that in which there is no parsonage-house, without a licence from the bishop; and such residence will excuse him from residing on the other living. *Wynn v. Smythies, E. 55 G. 3.* 547

### NONSUIT.

See ARBITRATION, 3.

### NUSANCE.

A window frame erected on a party-wall, held not to be a common nuisance within the 14th Geo. 3. c. 78, so as to deprive the owner of it

of his right to the windows, which were proved to be ancient lights; and if it were, that it would not, without conviction, be an answer to an action for obstructing them. *Titterton v. Conyers, E. 54 G. 3.* 140

### ORDER.

Of Justices, See JUSTICES OF PEACE.

### OUTLAWRY.

See EVIDENCE, 4.

### OYER.

For a variance between it and the condition, See DEBT ON BOND.

### PARTICULAR.

Of set-off, See EVIDENCE, 2.

### PARTITION, WRIT OF.

See AMENDMENT, 14.

### PARTNERSHIP.

See BANKRUPT, 2.  
INSURANCE, 10.

1. A defendant may plead a secret partnership in abatement, though the plaintiff had no means of knowing of the partnership, and could not have proved it, had he joined the secret partner in the action. *Dubois and others, assignees of Schroder, v. Ludert, T. 54 G. 3.* 246
2. Three partners, A. B. and C., order goods from abroad, and then dissolve partnership, and make over their property to trustees for their creditors, leaving A. and B. as agents, to settle the affairs of the firm. The goods arrive, and are delivered to A. and B. In an action against A. B. and C. for the freight, *held*, that C. was not liable. *Pinder v. Wilks and others, T. 54 G. 3.* 248
3. Two partners, A. and B., on the

26th of August, 1809, agree to dissolve partnership as from the 1st of January 1810, and that neither of them shall, after signing the deed of dissolution, make any purchase to bind the other; but that every such purchase shall be on his own private account. On the 27th of October, 1810, *A.* assigns his property to his creditors, who covenant not to sue him, and that if they do, the deed of assignment shall be a release to him, which deed is signed by *B.* *A.* having contracted debts in the name of the firm, after signing the deed of dissolution, *B.* pays them.—*Held*, 1st, that *B.* was liable for those debts, the covenant not to sue *A.* not operating as a release to *B.* 2dly, that supposing it had, the creditors would have had an equitable claim on *B.*, which would have justified his paying the money; and, therefore, that *B.* was entitled to recover it from *A.* as money paid to his use. *Hutton v. Eyre*, *T.* 55 G. 3. 603

# PARTY-WALL.

See NUSANCE.

# PAYMENT.

See ANNUITY, 2.  
ATTORNEY.

1. What is a payment in fraud of the bankrupt laws, See BANKRUPT, 1.
2. Where money paid generally may be applied by the person receiving it to the liquidation of a simple contract debt, instead of a debt under seal, See COVENANT, 2.
3. Of money into court, See COSTS, 6. PRACTICE, 9.
4. Payment of rent by mistake not conclusive against the person paying it; See LANDLORD AND TENANT, 1.

# PENAL ACTION.

See NON-RESIDENCE.  
PILOT.

1. The record amended by entering a remittitur of the damages. See AMENDMENT, 2.
2. The court will change the venue in a penal action, on the usual affidavit, as well as in any other action. *Wynn v. Bellman*, clerk, *M.* 55 G. 3. 320
3. But they will not alter the term of which a declaration is entitled to a previous term, in order to bring it within the time limited for the action. *Woodroffe v. Williams*, *H.* 55 G. 3. 419
4. A writ is sued out in a penal action within the time limited, returnable in *Easter* term, 1813, but which is never returned; the issue is of *Hilary* term, 1815; it is objected that the action was not brought in time; in answer, the plaintiff produces rules for time to declare from *Mic.* term, 1813, to *Trin.* term, 1814.—*Held*, that this was not sufficient evidence to connect the declaration with the writ, from which the court could presume that the declaration had been filed in time. *Thislewood, qui tam, v. Cracroft and D'Arley*, *E.* 55 G. 3. 497
5. *Semb.* that in an action for the penalties given by the 9 *Ann. c.* 14. s. 2., a bill of discovery filed against the defendant for the purpose of a former action, on the former part of the 2nd section for the money lost, may be given in evidence. *Id.*

# PILOTS.

The penalties imposed by stat. 52 *Geo.* 3. c. 39. s. 11., on ships neglecting to take in a pilot, on arriving off *Dungeness*, are to be calculated, on ships bound for the river, not on the pilotage due from *Dungeness* to the *Docks*, but on that which would be due on the ship's arrival at her ultimate place of destination in the river. *Mackie v. Landon*, *T.* 55 G. 3. 583

## PLEADING.

See ACTION ON THE CASE, 1.

AMENDMENT, 16.

ANNUITY, 1.

BILLS OF EXCHANGE, 4, 6.

COSTS, 3.

COVENANT, 4.

EVIDENCE, 8.

LANDLORD AND TENANT, 2.

PARTNERSHIP, 1.

PRACTICE, 1, 2, 5, 8, 10, 12.

SHERIFF, 5, 7.

1. The plaintiff in replevin may plead in bar to the defendant's avowry or cognizance, that he did not hold as tenant, with a plea of infancy. *Wilson v. Ames, H. 54 G. 3.* 74
2. In debt on bond, a replication which denies the defendant's averment of performance, and concludes to the country, and then assigns breaches, is bad on demurrer. *Sir William Plover and another, Sheriff of Middlesex, v. Ross, H. 54 G. 3.* 95
3. And if the defendant, instead of demurring, take issue and go to trial on the question of performance, the court will, after verdict, award a repleader. *ibid.*
4. Plea by an executor of judgment recovered in a plea of debt on the testator's simple contract. See EXECUTOR, 2.
5. To debt on bond, the condition of which was, "that *A. B.* should deliver a true account of all monies received by him in pursuance of his office;" the defendant pleaded performance generally. The plaintiff, in his replication, assigned for breach "that *A. B.* was requested to deliver a true account of all monies received by him in pursuance of his office, but refused so to do." — *Held*, on special demurrer, that this assignment of the breach was

bad, in not alleging "that *A. B.* had received any monies by virtue of his office." *Serra and others v. Fyffe, H. 55 G. 3.* 441

6. In an action on bond, conditioned for the payment of a separate maintenance to the obligor's wife, the declaration alleged that certain sums became due and owing from the defendant to the plaintiff; — judgment arrested, because the breach should have alleged the money to be due to the wife. *Lam v. Payne, E. 55 G. 3.* 495
7. A declaration, stating that the defendant published of the plaintiff a false and malicious libel, purporting thereby that the plaintiff's beer was of a bad quality, and deficient in measure, whereby he was injured in his credit and business: *Held* bad on general demurrer. *Wood v. Brown, E. 55 G. 3.* 522

## POLICY.

1. Alteration of; — See INSURANCE, 4, 7.
2. When it attaches; — *Ibid.* 8.

## POSSESSION.

See BILLS OF EXCHANGE, 5.  
EVIDENCE, 5.

## PRACTICE.

See AFFIDAVITS.

AFFIDAVIT TO HOLD TO BAIL  
AGREEMENT, 5.

AMENDMENT.

ARREST.

ATTACHMENT.

BAIL.

COSTS.

COSTS—SECURITY FOR.

DISTRINGAS.

EVIDENCE.

FINES.

INFANT.

PENAL ACTION,

PROCESS.

REPLEVIN, 4.

SHERIFF.

WITNESS.

WRIT OF RIGHT.

1. A plea *pro darrein continuance* may be pleaded at any time after the last continuance, either in *bank* or at *nisi prius*; and it is imperative on the judge at *nisi prius* to receive it. *Prince v. Nicholson*, H. 54 G. 3. 70
2. The plaintiff cannot object at *nisi prius*, that the plea is such a one as ought not to be received. *ibid.*
3. A defendant cannot go to trial by proviso, unless there have been a default on the part of the plaintiff; though there have been a former trial, and though the defendant gave notice to the plaintiff of his intention to carry down the record. *Worcestershire and Staffordshire canal company, v. The Trent and Mersey navigation company*, E. 54 G. 3. 218
4. The defendant in *audita querela* cannot move in arrest of judgment, but must either demur at the time of filing the writ of *audita querela*, or, if the verdict be given against him, must bring a writ of error, or move for a new trial. *Giles and another, v. Nathan and another*, E. 54 G. 3. 226
5. Where a defendant is held to bail on a writ issued against himself and another, and the plaintiff declares against one only, the court will set aside the declaration and subsequent proceedings. *Jonge v. Murray and another*, T. 54 G. 3. 274
6. Where a writ of error is sued out before final judgment, the four days for putting in bail in error are to be reckoned from the time when the taxation of costs is completed by the insertion of the sum. *Blackburn v. Kymer*, T. 54 G. 3. 278

7. Venue changed in a penal action; —See PENAL ACTION, 2.

8. If the declaration be not entitled of the term in which the writ is returnable, or of that of appearance, it is irregular; and a judgment signed for want of a plea thereto is also irregular. *Topping v. Fuge and another*, M. 55 G. 3. 341
9. In an action for work and labour, the defendants, having offered by letter to pay a certain sum for the debt, with the costs up to that time, which was refused by the plaintiff, obtained a rule to shew cause why the sum of 5*l.* and the costs should not be paid into court, and further proceedings stayed, and why the plaintiff should not pay the costs incurred since the tender; and why, if the plaintiff refused to accept it, the 5*l.* should not be paid into court, and struck out of the declaration. —The court discharged the rule, it appearing that there was nothing oppressive in the plaintiff's conduct. *Gibbon v. Copeman*, M. 55 G. 3. 392
10. Where a judgment has been given for the defendant on demurrer to a plea, the court will not, in a subsequent term, set aside that judgment, and suffer the plaintiff to reply, by confessing the matters contained in the plea, and taking judgment of assets *quando acciderint*. *Prisco v. Nicholson, Executor, &c.* H. 55 G. 3. 401
11. A defendant may move to set aside the service of a writ for irregularity, at any time before a new step is taken in the cause. *Dand v. Barnes*, H. 55 G. 3. 403  
See No. 14. of this Art.
12. Where a defendant is sued by a wrong name, receives notice of declaration, and neglects to appear and plead in abatement, but suffers the plaintiff to sign judgment and

- execute a writ of inquiry, he cannot afterwards move the court to set aside the proceedings for irregularity. *Smith and another v. John Patten, sued by the name of Joseph Patten, E. 55 G. 3.* 474
13. Proceedings set aside on the ground that the defendant, having two christian names, is sued by only one of them. *Arbouin v. Willoughby, E. 55 G. 3.* 477
14. A motion to set aside proceedings for irregularity should be made as soon as the plaintiff, by taking a new step in the cause, shews that he means to proceed;—therefore, when a defendant has been served with notice of declaration, and, interlocutory judgment having been signed, with notice of executing a writ of inquiry, he is too late to take advantage of a defect in the process. *Fletcher v. Wells, E. 55 G. 3.* 550
15. Where a writ is returnable the last return of one term, and the defendant does not justify bail till the first day of the next term, he is not entitled to an imparlance, though the plaintiff do not deliver a declaration *de bene esse*, till after the essoin day of the second term. *Kent v. Yates, T. 55 G. 3.* 587

### PRINCIPAL AND SURETY.

See BAIL, 2, 4.

BILLS OF EXCHANGE, 1, 3, 6, 7, 8, 11.

### PROCESS.

See AFFIDAVITS, 6.

AMENDMENT, 7.

PRACTICE, 5, 8, 11, 12, 13, 14, 15.

SHERIFF, 2, 3, 4, 6, 7.

1. Where a defendant keeps out of the way to avoid service of process, and a notice of declaration is sent to him in a letter by the post, which is returned opened, and

marked "refused:—" *Held*, that this is sufficient service. *Aldred v. Hicks, M. 54 G. 3.* 8

2. The court will not quash a writ, on the ground of its having been served in a wrong county. *Watson v. Stedman, M. 54 G. 3.* 9
3. In the notice to appear, required by 5 *Geo. 2. c. 27. s. 1.* to be written at the bottom of the copy of process served on the defendant, the court, in *Rogan v. Lee, T. 54 G. 3. p. 272*, held that the year, as well as the day of the month, must be in words at length; but afterwards overruled that decision, and held that it was not necessary. *Kennington v. Anderson, T. 55 G. 3.* 577

### PROHIBITED GOODS.

See INSURANCE, 3.

### PROMISSORY NOTES.

See AFFIDAVIT TO HOLD TO BAIL, 4.  
BILLS OF EXCHANGE.

### PROPERTY.

1. Transfer complete, without the indorsement of the bill of lading. See BILLS OF LADING, 3.
2. Property in a ship not divested by foreign condemnation. See INSURANCE, 11.

See CONSIGNMENT.

### REAL ESTATE.

See DEVISE.

### RECORD.

See AMENDMENT, 2, 3, 6.

### RECOVERY.

See AMENDMENT, 13.

### RELEASE.

See BILLS OF EXCHANGE, 6.  
PARTNERSHIP, 3.

**RENT.**

Payment of by mistake not conclusive against the person paying it.  
*See* LANDLORD AND TENANT, 1.

**REPLEADER.**

*See* PLEADING, 3.

**REPLEVIN.**

*See* COSTS, 3.

LANDLORD AND TENANT, 1.

1. For the sufficiency of the sureties,  
*See* SHERIFF, 1.
2. The plaintiff may plead in bar to the defendant's avowry or cognizance, that he did not hold as tenant, with a plea of infancy. *Wilson v. Ames*, H. 54 G. 3. 74
3. Where goods are distrained, and at the end of five days appraised, but not sold, the act of appraisal does not take away the plaintiff's right to replevy them. *Jacob v. King*, E. 54 G. 3. 135
4. Where judgment is given on demurrer for the avowant in replevin, fifteen days notice of executing the writ of inquiry should be given to the plaintiff, as in the case of nonsuit, on *stat. 17 Car. 2. c. 7.* *Burton v. Hickey*, H. 55 G. 3. 444

**RIGHT OF COMMON.**

*See* COMMON.

**RIVER.**

*See* FISHERY.

What is evidence sufficient to presume a creek to be a public navigable river, *See* EVIDENCE, 7.

**ROAD.**

*See* ACTION ON THE CASE, 2.  
 JUSTICES OF PEACE.

**SALE.**

*See* VENDOR AND VENDEE.

**SALVAGE.**

*See* INSURANCE, 12.

**SATISFACTION.**

*See* COVENANT, 2.

**SECURITY—FOR COSTS.**

*See* COSTS—SECURITY FOR.

**SET-OFF.**

1. Particular of. *See* EVIDENCE, 2.
2. What shall be considered a case of mutual credit, within 5 Geo. 2.  
*c. 30. s. 28.* *See* BANKRUPT, 2.

**SHERIFF.**

*See* AMENDMENT, 5, 14.

BAIL, 8.

**EXECUTION.**

1. It is sufficient for the sheriff, in taking sureties on a replevin bond, that they are apparently responsible; he is not obliged to inquire into their actual sufficiency. *Hindal v. Blades and another*, M. 54 G. 3. 27
2. Where a defendant has been arrested by a wrong christian name, and the sheriff returns 'I have taken A. B. sued by the name of 'C. B.,' the sheriff is a trespasser; and the court will set aside an attachment issued against him for not bringing in the body. *The King v. The Sheriff of Surrey, in a cause of Caffall v. Huntley*, H. 54 G. 3. 79
3. Where a rule to return a writ, issued out of this court, expires in vacation, the sheriff must file it at the return, and cannot wait till the ensuing term; the *Common Pleas* office being open during the vacation. *The King v. the Sheriff of Middlesex, in a cause of Thompson v. Powell*, T. 54 G. 3. 270
4. Where the sheriff, on being ruled to return a writ, gave notice to the plaintiff that the writ was lost, and

that the defendant was in custody; the plaintiff should have proceeded as if the sheriff had returned *cepi corpus*; and the court set aside an attachment issued against the sheriff for not returning the writ. *The King v. the Sheriff of Kent*, in a cause of *Read v. Heywood*, T. 54 G. 3.

- 289
5. In trespass for breaking and entering the plaintiff's house, and continuing therein from, &c. till the commencement of this suit; the defendant, as to the continuing in the house for a part of the time, "to wit, for the space of two days," justifies as sheriff, under a *fi. fu.* issued against the goods of T. K. deceased, in the hands of the plaintiff's wife, as administratrix, to be administered; and that, having just grounds to believe that there were goods in the plaintiff's house liable to be seized, he entered to search for the same, and staid therein for the space of time in the declaration mentioned, *the same being a reasonable time in that behalf*. The replication alleges that the two days mentioned in the plea were an unreasonable length of time, for the defendant's searching for the goods; and then new assigns. *Held*, on special demurrer, 1st, that the replication was bad, in having tendered an immaterial issue, and also as being double:—2dly, that the defendant was justified in entering the plaintiff's house, by his belief that the goods were there; though that belief were not justified by the event. *Cook v. Birt, sheriff of Surrey*, M. 55 G. 3. 333.—And see No. 7. of this art.

6. In an action against the sheriff for not arresting, it is not sufficient evidence to connect the sheriff with his officer, that the officer's name appears on the writ, and that

the writ has been returned *non est inventus*;—the sheriff having gone out of office before the return. *Funsick v. Magnay, Esq. and another*, T. 55 G. 3. 554

7. In a plea of justification by the sheriff to an action for breaking the plaintiff's house, and breaking open the inner doors, it is not sufficient to allege that he entered under a *capias* against one A. B., the outer door being open; and that the rooms in the house being fastened, and having reasonable suspicion that A. B. was therein, the defendant broke open the same;—without averring that A. B. was actually in the house, or that there was any previous demand of admittance;—the sheriff being justified, or not, in entering the house of a stranger, by the event. *Johnson v. Leigh, Esq. and another*, T. 55 G. 3. 505

## SHIP.

See AGREEMENT, 2.  
COMMISSION.  
INSURANCE.  
LIEN.  
PILOTS.

## SIMONY.

See AGREEMENT, 3.

## SIMPLE CONTRACT.

See EXECUTOR, 2.

Where money paid generally may be applied by the person receiving it to the liquidation of a simple contract debt, instead of a debt under seal; See COVENANT, 2.

## SPORTING.

See GAME LAWS.  
TRESPASS.

STAMP.

See AFFIDAVITS, 2.

BILLS OF LADING, 2.

VENDOR AND VENDEE, 9.

1. That a letter, promising to accept a bill of exchange, requires a stamp. See BILLS OF EXCHANGE, 2.

2. Declaration of interest in a policy of insurance altered without making a new stamp necessary; See INSURANCE, 4.

3. Where several underwriters on a policy enter into an agreement to refer the cause to arbitration, that agreement and the award require, each, but one stamp;—there being a community of interest between the parties in the subject matter. *Goodson and another v. Forbes, E. 55 G. 3.* 525.

STATUTES.

*Elizabeth.*

31. c. 5. Penal action. 321  
31. c. 6. Simony. 299

*James 1.*

21. c. 4. Penal action. 321  
c. 19. Bankrupt. 469

*Charles 2.*

17. c. 7. Distresses. 444

*William and Mary.*

2. sess. 1. c. 5. Distresses. 135

*William 3.*

8 & 9. c. 11. s. 8. Assignment of breaches. 96  
c. 15. s. 2. Arbitration. 471

*Anne.*

5. c. 14. s. 4. Game. 106  
9. c. 14. Gaming. 497  
12. st. 2. c. 12. Simony. 299

*George 2.*

2. c. 23. s. 23. Attorney. 539  
5. c. 27. s. 1. Process. 272. 577  
c. 30. s. 29. Bankrupt. 184  
19. c. 32. s. 1. Bankrupt. 128

*George 3.*

5. c. 14. s. 3. Fishery. 127  
13. c. 78. s. 19. Highway. 261  
14. c. 78. Building act. 140  
17. c. 20. Annuity. 155. 407. 478. 533  
20. c. 60. s. 19. Ship's register. 7  
34. c. 68. s. 14. Ship's register. 76  
35. c. 63. s. 13. Stamp. 160  
43. c. 46. s. 3. Costs. 21  
c. 84. Non-residence. 368. 372. 387. 547  
c. 141. Justices of peace. 220  
48. c. 149. Stamp. 204. 412  
49. c. 121. Bankrupt. 359  
51. c. 124. s. 2. Distringas. 267  
52. c. 39. s. 11. Pilot act. 585  
54. c. 54. Non-residence. 368. 372. 387. 547

SURETIES.

1. For the sufficiency of, in replevin, See SHERIFF, 1.

SURETY AND PRINCIPAL.

See BAIL, 2, 4.

BILLS OF EXCHANGE, 1, 3, 6, 7, 8, 11.

TENDER.

See BILLS OF EXCHANGE, 3.  
PRACTICE, 9.

A tender to a managing clerk, before action brought, is good; though the clerk should have received orders not to accept it. *Muffatt v. Parsons, H. 54 G. 3.* 55

TRANSFER—OF PROPERTY.

Complete without the indorsement of the bill of lading. See BILL OF LADING, 3.

See LIEN.



## TRESPASS.

See EXECUTION, 2. SHERIFF, 2, 5, 7.

In trespass for breaking and entering the plaintiff's closes, and ~~sporting~~ there, under circumstances of aggravation, the jury gave 500*l.* damages:—The court refused to reduce them, though the plaintiff had sustained no actual pecuniary damage. *Merest v. Harvey, E. 54 G. 3.* 139

## TRIAL—BY PROVISIO.

See PRACTICE, 3.

## TROVER.

See CONSIGNMENT.

VENDOR AND VENDEE, 1, 3, 10.

## TRUSTEE.

See ASSIGNMENT.

Action against the trustees of a turnpike road, for damages occasioned by them in the execution of their office. See ACTION ON THE CASE, 2.

## TURNPIKE ACT.

See ACTION ON THE CASE, 2.

## VARIANCE.

See DEBT ON BOND.

VENDOR AND VENDEE, 5.

## VENDOR AND VENDEE.

1. *A.* purchases from the defendant a quantity of oil, which was not to be drawn off, but by agreement was to remain undivided in the defendant's cisterns, and for which *A.* was to pay a weekly rent for warehouse room; *A.*'s bill for the oil being dishonoured, and he having become

bankrupt:—*Held*, that the oil not having been severed from the defendant's stock, this did not amount to such a delivery as would entitle the assignees of *A.* to maintain trover for it. *White and others, assignees of Shuttleworth and Goodfellow, v. Wilks, M. 54 G. 3.* 2

2. It is not sufficient to invalidate a contract for the sale of goods, that the vendor knew they were to be applied to an illegal purpose, unless he have a share in the unlawful transaction. *Hodgson and another, v. Temple, M. 54 G. 3.* 3

3. *A.* having a quantity of hemp in the hands of *B.*, sells part of it to *C.* at a certain price, payable by *C.*'s acceptance at a stated time, 14 days allowed for delivery; and gives to *C.* an order upon *B.* to weigh and deliver the hemp, so sold, to *C.* or bearer. Before the 14 days had expired, *A.* gives *B.* notice not to deliver the hemp to *C.* The hemp not having been weighed off, and no bill of exchange having been given in payment for it,—*Held*, that the sale of it to *C.* was incomplete; and that *B.* was liable for it in an action of trover by *A.* *Shepley v. Davis and another, T. 54 G. 3.* 252

4. *A.* buys a house at an auction, and deposits part of the purchase money, the remainder to be paid upon the vendor's making a good title. It turns out that the vendor's title is good in law, but bad in equity:—*Held*, that *A.* is entitled to recover back the deposit from the auctioneer in an action at law. *Maberly v. Robins, T. 54 G. 3.* 253

5. *A.* agrees to buy and *B.* to sell a quantity of "St. Petersburg clean hemp," at a certain price, through the medium of a broker, who acts as agent for both parties. The broker delivers a bought note to *A.*,

- in which, by mistake, he inserts "*Riga Rhine* hemp," instead of "*St. Petersburg* clean hemp," and then delivers a sale note to *B.*, stated correctly, according to the original contract. *Held*, that the variance between the two notes was fatal, and therefore, that *B.* could not recover in an action against *A.* for not completing the contract.—*Thornton and others v. Kempster*, *M.* 55 G. 3. 355
6. An auctioneer, receiving money as a deposit on the sale of an estate by auction, knowing that there is a defect in the vendor's title, is answerable to the purchaser for the deposit, though he should have paid it over to the vendor. *Edwards v. Hodding*, *M.* 55 G. 3. 377
7. *Semb.* that he is a mere stakeholder, and not to be considered as agent for both parties; and that he is liable, at all events, till the contract be completed. *ibid.*
8. In an action for not delivering goods according to agreement, after demand made, it is not necessary to adduce evidence in support of the averment, 'that the plaintiff was ready and willing to accept and pay for the goods.' *Wilks v. Atkinson*, *H.* 55 G. 3. 412
9. Where a man agrees to sell a quantity of oil, he not having the oil ready made, but only the raw materials for making it;—*Held*, that this is a contract for the sale of goods, wares and merchandize, within the exemption of the stamp act. *ibid.*
10. *A.* sells an estate to *B.*, who pays part of the purchase money, and the title deeds are deposited with *C.*, to be delivered up to *B.*, when he pays the residue. *A.* gets possession of them again, and pledges them to *D.* for a valuable consideration.—*Held*, that *B.*, on tendering the remainder of the purchase money, is entitled to recover the deeds from *D.* *Hooper and others, assignees of Wells, v. Ramsbottom and others*, *H.* 55 G. 3. 414
11. *A.* puts goods up to auction, one of the conditions of sale being, that the goods should be taken away at the buyer's expence, within fourteen days; in default of which, the deposit to be forfeited, the goods to be resold, and the loss to be made good by the purchaser at the auction.—*B.* buys the goods, and a bought note is entered into with this clause; "14 days for receiving and delivery."—*Held*, that the meaning of the two contracts (the conditions of sale and the bought note) was, that the 14 days should be allowed to the purchaser only; and that the vendor should have been always ready to deliver them on request. *Hagedon v. Laing*, *E.* 55 G. 3. 514
12. *Semb.* that this was not a contract to entitle *A.* to recover on the counts for goods bargained and sold;—or at least that he was not so entitled, after having resold the goods. *ibid.*
13. A bankrupt's estate is sold by auction; the purchaser, after having paid a deposit, gives notice that he means to abandon the purchase, on a supposed defect in the title; the commission is afterwards superseded, on the ground that there was no good petitioning creditor's debt, and another commission issues, and the same assignees are chosen:—*Held*, that as the assignees, at the time when they received notice from the purchaser, had not a good title to the estate, they could not enforce the contract, nor, consequently, retain the deposit. *Bartlett v. Tuchin and another*, *T.* 55 G. 3. 583

## VENUE.

1. Affidavit to change the venue, *See* AFFIDAVITS, 3.
2. Venue changed in a penal action, *See* PENAL ACTION, 2.
3. In an action on the case, for damaging the plaintiff's wharf, the description of the premises in the declaration referred to the venue, and not necessary to be proved as laid; *See* ACTION ON THE CASE, 1.

## VICAR.

*See* ASSUMPSIT, 4.

## VOYAGE.

Description of in a policy, *See* INSURANCE, 8.

## USURY.

*See* BILLS OF EXCHANGE, 8.

## WAREHOUSEMAN.

*See* CONSIGNMENT.

## WARRANTY.

*See* INSURANCE, 15.

## WINDOWS.

Obstruction of, *See* NUSANCE.

## WITNESS.

1. In ejectment, the defendant's son is not a competent witness to prove that he, and not his father, is tenant in possession. *Doe on the demise of Jones and others, v. Wilds, M. 54 G. 3.* 7

2. The court will not grant an attachment against a witness, for not appearing to give evidence according to his subpoena, he having attended for two days, in expectation of the trial coming on, and having, on the third, left the court on his own business, on hearing that some other causes were coming on. *Blandford v. De Tastet, M. 54 G. 3.* 42
3. Nor unless a clear case of contempt can be made out against him. *Holme v. Smith, H. 55 G. 3.* 410
4. Nor where the witness resides 24 miles from the assize town, and his expences are not tendered to him till the evening before the trial. *ibi*
5. When costs shall be allowed for bringing a witness from abroad, *See* COSTS, 4, 5.

## WRIT.

*See* PROCESS.

## WRIT OF ERROR.

*See* BAIL, 5.

PRACTICE, 6.

## WRIT OF PARTITION.

Amendment of, *See* AMENDMENT, 14.

## WRIT OF RIGHT.

*See* EVIDENCE, 5.

The court will not assist the demandant in a writ of right; and therefore will not allow him to quash a writ of summons, which has been irregularly executed. *Adams, demandant, Radway, tenant, T. 55 G. 3.* 631

END OF THE FIRST VOLUME.

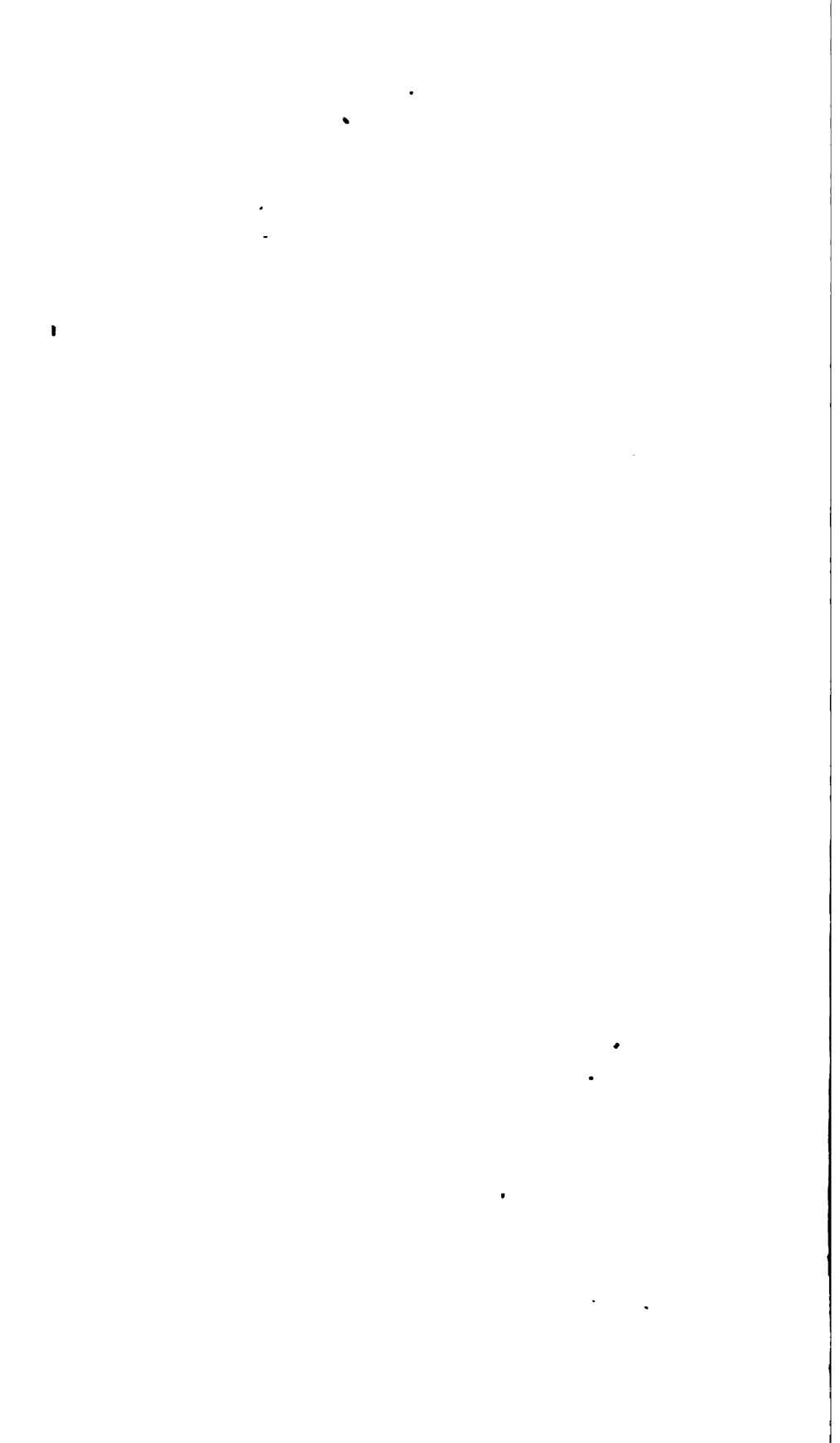
## ADDENDA ET CORRIGENDA.

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- To the *Memoranda* prefixed to *Easter* term, 54 *Geo. 3.*, add the following.—  
‘Towards the latter end of this term, Mr. Serjt. *Vaughan* was appointed  
‘Solicitor to her Majesty, in the room of Mr. Baron *Richards*.’
- Page 42, *Note (a)*; after *posted*, read ‘p. 119;’ and dele the words ‘at nisi prius.’
- 130, At the end of the case *Hobroyd v. Whitehead*, for ‘Discharged,’ read  
‘*Refused*.’
- 146, In the title of the case, for ‘*Kymre*’ read ‘*Kymer*.’
- 184, In the margin, line 6 from the bottom, for ‘s. 18,’ read ‘s. 28.’
- 191, In the margin, line 6 from the bottom, for ‘*A.*’ read ‘*B.*’
- 214, In the margin, line 7, for ‘100l.’ read ‘one hundred pounds;’ at full  
length.
- 258, Line 2, after *Busk v. Davis*, insert as a note of reference, ‘See the re-  
port of that case, 2 *M. & S.* 397.’
- 274, After the case of *Rogan v. Lee*, insert as a note, ‘But see *Kenning-  
ton v. Anderson*, *postea* 577, where the court overruled this decision.’
- 323, In the margin, line 5 from the bottom, for ‘defence,’ read ‘point.’
- 372, In the margin, line 4 from the bottom, for ‘note,’ read ‘not.’







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